THE
LAW QUARTERLY REVIEW.

No. XLIII. July, 1895.

NOTES.

THE case of *Toulmin* v. *Steere* (1817, 3 Mer. 210, 17 R. R. 67) has had a chequered career. There Sir William Grant enforced the doctrine that if a mortgagee purchase an estate subject to another but subsequent mortgage, and the purchaser's mortgage debt be paid off out of the purchase money, the subsequent mortgage becomes a first charge on the estate, and the purchaser cannot afterwards set up his extinguished mortgage against the subsequent mortgagee. The result is that the latter gains great advantage by a transaction to which he is not a party and at the expense of the purchaser, who is under no liability to pay him. We know that in *Gregg* v. *Arrott* (Ll. & Goo. 251) Lord St. Leonards said that both he and Sir S. Romilly, who were counsel in *Toulmin* v. *Steere*, thought 'at the time' that the decision was wrong. The case has often been cited, and Sir George Turner is almost the only judge who has regarded the decision with favour (*Squire* v. *Ford* (1851), 9 Hare, 60). Careful conveyancers exclude the operation of the rule by the insertion in the deed of a provision that the debt that is paid off and extinguished shall be considered to be kept alive as a protection against mesne incumbrances. Modern decisions show that the courts will not apply the doctrine of *Toulmin* v. *Steere* if, in the absence of an express provision in the deed, the circumstances surrounding the execution of the deed show that it was the intention of the parties that the debt, which is paid off, should be kept alive (*Adams* v. *Angell* (1877), 5 Ch. D. 634; *re Pride*, '91, 2 Ch. 135). It is to be regretted that the law lords did not avail themselves of a late opportunity of overruling *Toulmin* v. *Steere*. In *Thorne* v. *Cann* ('95, A. C. 11, 64 L. J. Ch. 1) that case came for the first time before the House of Lords. Lord Herschell said, '*Toulmin* v. *Steere* is a case which certainly has not met with universal acceptance: it has been often commented upon and criticized adversely. It appears that an appeal was contemplated though circumstances rendered it unnecessary.' Lord Watson spoke of 'the very doubtful authority of the rule laid down in *Toulmin* v. *Steere*'; and Lord Macnaghten added, 'The authority of that case cannot

nowadays be treated as going beyond the actual decision.' It is almost inconceivable that the doctrine of *Toulmin* v. *Steere* should operate without working actual injustice, and since the House of Lords has stopped short of overruling it, conveyancers will still have to insert in their drafts the ugly and apparently inconsistent provision excluding its operation.

An action for, or in the nature of, slander of title will not lie unless the statement complained of is false, and false to the knowledge of the defendant, and has caused actual damage. Mere puffing of one's own wares in comparison with a rival's will not give him a cause of action if all these conditions are not satisfied. This is really well-settled law, but the peculiar turn taken by the evidence, and the shifting of ground during the argument, seem to have disguised it even in the eyes of the Court of Appeal in *Mellin* v. *White*, where it is now clearly affirmed by the House of Lords, '95, A. C. 154, 64 L. J. Ch. 308.

Income tax is chargeable under Schedule (D) on the annual profits or gains, or, in other words, the income, arising from a trade being 'carried on or exercised in the United Kingdom,' and this, be it noted, whether the person carrying on or exercising the trade is a British subject or an alien.

For the determination then of the question how far the income resulting from a trade is liable to income tax, the courts are often required to decide whether it is or is not 'carried on or exercised in the United Kingdom.'

San Paulo Railway Co. v. *Carter*, '95, 1 Q. B. (C. A.) 580, 64 L. J. Q. B. 379, is the latest of a long line of cases, beginning in 1859 with *Att.-Gen.* v. *Sulley*, 4 H. & N. 769, which more or less define the circumstances under which a trade can be said to be carried on or exercised in the United Kingdom. The result of the decisions is curious and a little startling. A trade, it will be found, is 'carried on or exercised in the United Kingdom' in at least two quite different cases.

First case—A trade is carried on in the United Kingdom when the ultimate management, or the centre and control, of the business is placed in the United Kingdom, or in other words when the management of the business as a whole is placed in the hands of persons who reside or have their head office in the United Kingdom.

When this is the case the whole business is carried on in the United Kingdom even though the transactions (e. g. sales) from which profits arise take place mainly or even wholly outside the United Kingdom. (See *Cesena Sulphur Co.* v. *Nicholson*, 1 Ex. D. 428, 452, 454, judgment of Huddleston B.; *Imperial Continental Gas Association* v. *Nicholson*, 37 L. T. 717; *London Bank of Mexico* v. *Apthorpe*,

'91, 2 Q. B. (C. A.) 378, 60 L. J. Q. B. 653; *San Paulo Ry. Co.* v. *Carter*, '95, 1 Q. B. (C. A.) 580.)

Second case—A trade or business is carried on or exercised in the United Kingdom when or in so far as any material part of the transactions (e. g. sales) by which profits are earned takes place in the United Kingdom, and this holds good even though the ultimate management or the central point of the trade is placed in a foreign country. (See *Erichsen* v. *Last*, 8 Q. B. Div. 414; *Tischler* v. *Apthorpe*, 52 L. T. N. S. 814; *Pommery* v. *Apthorpe*, 56 L. J. Q. B. 155; *Werle* v. *Colquhoun*, 20 Q. B. Div. 753.)

Hence an extraordinarily wide extension of the operation of the Income Tax Acts. If *X & Co.*, an English company managing their business in England, make profits from the sale, e. g. of gas, which is manufactured and sold wholly in France, the whole income of the company is chargeable with income tax because the trade is 'carried on in the United Kingdom.' But if, on the other hand, *X & Co.* are a French company, makers and sellers of champagne, managing their business in France but making profit from sales of champagne in England, then every penny of profit thus made is chargeable with income tax as profits of a trade exercised in England. It is true, of course, that in the first case the whole income of the business is taxed, whilst in the second case only that part of the income is chargeable which results from English transactions. But it will be found when the matter is carefully looked into, that the principle of taxation is in each instance the same. The whole of the profits resulting from the trade being carried on in the United Kingdom are taxed; the only difference is that where the centre of the trade is in the United Kingdom, the whole trade is carried on, i. e. managed there, and as the whole of the profits result from such management the whole are taxed; whilst in the second case a part only of the trade is carried on or exercised, i. e. results from sales in the United Kingdom, and as a part only of the profits results from such carrying on, a part only is taxed.

This is the state of the law arising from the interpretation placed by the courts on Schedule (D), but the cases on which this interpretation rests have none of them come before the House of Lords.

Can the interpretation placed on Schedule (D) by the courts permanently stand? The answer admits of doubt. If we had no judicial decisions to guide us we should naturally come to the conclusion that one of the two senses given to the words 'carried on or exercised' ought to exclude the other. If *A* is held to carry on a trade in the United Kingdom because he manages it in London, though every penny of profit he makes arises from transactions

taking place in France, it would seem that *B*, who manages a trade at Paris, ought to be held to carry it on in France, even though some of the gains thereof result from transactions taking place in the United Kingdom, or that if *B* is held to carry on a trade in the United Kingdom, then that *A* ought to be held to carry on his trade not in the United Kingdom but in France. The double sense given to the expression 'carry on or exercise' sometimes perplexes the judges, and must presumably cause discontent in foreign countries. Until at any rate some case which in its circumstances resembles *Werle* v. *Colquhoun* is carried to the House of Lords, it must remain doubtful whether the courts have not given too wide an effect to Schedule (D) as far as regards the carrying on or exercise of a trade in a foreign country. It is of course arguable that a distinction is to be made between the term 'carried on' which occurs in the first paragraph, and the word 'exercised' which occurs in the second paragraph of Schedule (D). But this point, though arguable, is hardly tenable.

A careful study of the schedules of the Income Tax Act, 1853, the enactments connected therewith, as for example the Income Tax Act, 1842, s. 100, and the decisions on these schedules leads to a result which is apt to escape notice; the 'limit of taxation,' if the expression may be allowed, under the various schedules of the Income Tax Acts is, speaking broadly, and subject to some slight limitations, fixed by three principles, none of which appear *totidem verbis* in the Income Tax Acts.

First—Income tax is payable in respect of income accruing to any person, whatever his nationality, domicil, or residence, from a British source, or in other words from property or transactions in the United Kingdom.

Secondly—Income tax is payable in respect of the actual sums annually received in the United Kingdom out of an income accruing to any person resident in the United Kingdom from a foreign source. (Compare Schedule (D) and Income Tax Act, 1842, 3rd Rule, 4th Case and 5th Case.)

Thirdly—Income tax is not payable on any income which is not taxable under one or other of the foregoing principles. (*Colquhoun* v. *Brooks*, 14 App. Cas. 493, 59 L. J. Q. B. 53; *Bartholomay Brewing Co.* v. *Wyatt*, and *Nobel Dynamite Co.* v. *Wyatt*, '93, 2 Q. B. 499.)

'Treat your enemy as a possible friend and your friend as a possible enemy,' says Rochefoucauld, and the moral of *Trego* v. *Hunt* ('95, 1 Ch. (C. A.) 462, 64 L. J. Ch. 392) is the same. Treat your partner as a possible enemy, a rival *in futuro*. You will be entitled when the partnership expires to compete with your present

partners. Anticipate events and make a list now of the customers of the firm, so that you may solicit them successfully when the partnership is dissolved. This logic is unimpeachable. A partner has this prospective right according to *Pearson* v. *Pearson* (27 Ch. D. 145). Yet even as a matter of hard law such forearming might well be deemed at variance with the fundamental principle—the mutual trust and good faith—on which the contract of partnership is based. The Court of Appeal has preferred to adopt a strictly commercial view, suited to an age of 'economists and of calculators.' There is a borderland between law and morals expressed in the maxim 'Non omne quod licet honestum est,' and this case falls within it. It belongs to the domain of sentiment rather than logic. It is lawful for a man to marry again when his wife is dead, but we do not like a man to begin courting a second wife when he knows his first has only a year or so to live. The Court of Appeal has not been unanimous on this subject, and it remains to be seen whether the House of Lords may not ultimately restore the authority of *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, which for the present is overruled.

Chilton v. *Progress Printing and Publishing Co.*, '95, 2 Ch. (C. A.) 29, is a wholesome check to the attempts made from time to time to pervert the Copyright Acts to the purpose of creating a monopoly in bare facts or opinions as distinguished from works of literature or art. The framers of the Copyright Acts might have expressed their intentions better on various points, but the Court of Appeal had no difficulty in seeing that they did not intend to protect sporting tipsters.

An Act of Parliament can do much. Sir Thomas More thought it could not make a king the head of the church, but it can make a horse mean a cow and a single woman mean a widow or a wife (*R.* v. *Pilkington*, 2 E. & B. 546). It can also bind a creditor by a scheme of arrangement in bankruptcy, though he gets no benefit, no dividend out of the scheme (*Scaton* v. *Lord Deerhurst*, '95, 1 Q. B. (C. A.) 853). Here is the solution of the puzzle. Captain Pluck has a judgment. His debtor, Pigeon, goes bankrupt. Pluck assents to a scheme and tenders a proof for his judgment. The trustee of the scheme goes behind the judgment, finds it founded on a gambling debt, and disallows the proof. Poor Pluck has no remedy. His debt is a 'debt proveable in the bankruptcy.' In going behind judgments, in disallowing capitalized interest (Bankruptcy Act, 1890, s. 23), and in many other ways the court in bankruptcy is constantly exercising a very enlarged equitable jurisdiction, directed to secure the distribution of the estate among the bona fide creditors, to

frustrate knavish tricks and prevent plunder, and such is unregenerate human nature where insolvency is concerned, that the court has moreover to be always on the alert to see that its process is not being abused. *In Re Otway* ('95, 1 Q. B. (C. A.) 812) is an instance: where a debtor had a life interest of £1500 a year defeasible on bankruptcy. Here was a golden opportunity to squeeze the debtor by a petition. But the Court of Appeal unmasked the plotter. Such a petition is on the face of it futile, for a receiving order would annihilate all the assets.

Whether selfishness is, as Hobbes holds, the mainspring of human action or not, self-interest is an unfailing and thoroughly reliable quality in human nature, except in the case of some anomalous beings like Shelley or Samuel Taylor Coleridge, and the Court of Appeal has recognized it as such in *In re Cliff, Edwards* v. *Brown* ('95, 2 Ch. (C. A.) 21, 64 L. J. Ch. 423). Lacking this prospect, 'Victoria by the grace of God' may threaten or command the Englishman abroad—the awful mandate goes into the waste-paper basket with begging letters and company prospectuses; but drop a hint of something to be gained or possibly lost in administration proceedings here, and the absent beneficiary may be safely trusted to appear on the scene 'with wings as swift as meditation or the thoughts of love.' And this intimation can just as well be conveyed by a solicitor's letter without the leave of the court as with it. The wisdom of the legislature has in O. 11 carefully defined the cases in which leave to serve a person out of the jurisdiction may be given. An originating summons is not among them. It is designedly excluded, and the court cannot consistently with its self-respect purport to give a leave which it has no jurisdiction to give.

The Court of Appeal has now in *Broderip* v. *Salomon* (11 Times Reports, 238) declared all 'one man companies' to be an abuse of the Companies Acts. Nothing short of the mystic seven will do, and the seven must be 'all honourable men,' bona fide traders—none of them dummies. It is certainly unfortunate that this discovery as to the policy of the Companies Acts was not made earlier, for out of the thousands of private companies which have been formed in the last quarter of a century under the Companies Acts, it may be doubted if there are 10 per cent. which will satisfy the new test. The typical private company is a firm which has turned itself into a company, and in such a case the only real traders are the two or three partners. The rest are the requisite dummies. *Broderip* v. *Salomon* leaves these companies with a very questionable status, which is to be regretted. As to the sham company, the

company which is the mere *alter ego* of a promoter, there is no harm in holding it a trustee for its promoter, and very little good either, because, as Vaughan Williams J. has lately decided in *In re Carey* (Sol. J., Apr. 20), the company's creditors must first be paid in full, which, of course, leaves nothing for the promoter's creditors. The anomaly is that the one man company, sham or not, is in every formal respect a perfect company (*In re George Newman & Co.*, '95, 1 Ch. (C. A.) 674, 64 L. J. Ch. 407), liable possibly to be disincorporated, but in the meanwhile unassailable. The only way in which the views of the Court of Appeal in *Broderip* v. *Salomon* could be given effect to would be by an inquisitorial investigation by the Registrar of Joint Stock Companies on the application to register a company—an investigation which he has at present no power to make, if everything is *ex facie* regular.

In our overcrowded civilization some people may have misgivings whether public policy is after all so much in favour of marriage. Such cynics will find no encouragement at present (*Morley* v. *Renoldson*, '95, 1 Ch. (C. A.) 449). Marriage is still as much a duty of perpetual obligation as when Wilmot C.J. called celibacy a 'weed of the canon law' and 'the greatest of all political sins' as tending to depopulation. True in *In re Abdy* ('95, 1 Ch. (C. A.) 455) the holy estate of matrimony appears at some disadvantage as compared with the condition of concubinage, but it is only at first sight. Where husband and wife agree to separate and then come together again the covenants of the separation deed come to an end *cessante ratione*; but this does not apply to covenants in such a deed in favour of a concubine, which is based on an entirely different consideration. Hers are not the rights of a lawful wife, which revive on recohabitation, but the precarious tenure of a mistress. The covenant to pay an annuity in reality represents agreed damages for personal and social disparagement.

Sir Walter Scott was once at an evening party, listening with delight to a ballad being sung. He asked one who stood by him who was the writer of those beautiful lines, and he was told that they were—his own. Others have believed themselves the authors of what they have not written. As Prior says:

> 'The happy whimsy you pursue
> Till you at length believe it true.
> Caught by your own delusive art,
> You fancy first and then assert.'

A strange phantasmagoria is this mind of ours! and well it is that the *litera scripta* does remain to correct the 'frail testimony of memory' and the kaleidoscopic changes of thought and feeling.

Kekewich J., reflecting on these things, has arrived at the very just conclusion that the court must exercise great caution when invited to reform a voluntary settlement to suit the present views of the settlor as to what he thought he meant. The parol evidence ought in such a case to be of the clearest; in *Bonhote* v. *Henderson* ('95, 1 Ch. 742, affirmed '95, 2 Ch. 202) it was of the flimsiest. The truth is that in these ulterior limitations under voluntary settlements, whether by deed *inter vivos* or by will, where there is no bargaining the mind of the settlor is seldom really brought to bear on the contingency. It is only when the event has happened that the settlor begins to think about what he meant to do or thought he meant to do.

Kelly v. *Metropolitan Ry. Co.*, '95, 1 Q. B. 944, is an important supplement to *Taylor* v. *Manchester, Sheffield, & Lincolnshire Ry. Co.*, '95, 1 Q. B. 134, 64 L. J. Q. B. 6. Both decisions were in the Court of Appeal, and the result seems to be that the breach of a distinct duty to use reasonable care may always be treated as a tort, whether or not it is also a breach of contract, and whether the specific negligence complained of consisted in a positive misfeasance or in an omission. This last point is now covered by *Kelly's* case, where the negligence was an engine-driver's omission to shut off steam in due time. After these decisions it seems impossible to maintain the authority of *Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. 213, 34 L. J. C. P. 292, although a considered judgment of the late Mr. Justice Willes is not lightly to be dissented from. What the Court of Appeal have now done is really to restore the view which prevails in all the earlier authorities, and which underlay the action of assumpsit itself. The framers of the County Courts Act no doubt supposed the distinction between actions founded on contract and actions founded on tort to be plain and exhaustive; a little more knowledge of the history of the law would have saved much litigation.

Lord Bramwell was fond of describing a railway company as 'caput lupinum.' In *Great Northern Railway* v. *Palmer* ('95, 1 Q. B. 862), if the railway company figures as a wolf, the passenger figures as the lamb. For what does it come to? Viator, as old Isaac Walton would say, finds an excursion train advertised to run from London to York. Viator has friends living a few miles out of York, and he thinks he will seize the opportunity to pay them a visit. So he takes an excursion ticket and goes on to the next station beyond York, where his friends live, paying or tendering the extra fare. For this it appears the railway company is entitled to forfeit the ticket under the conditions of issue as having been used for a station 'other than that named on it.' Why does not the railway company go

a step further and see that the cheap tripper is kept strictly to excursionist business—his eight hours' lounge on the beach, his bathing machine, swing or roundabout, and the usual allowance of sea-sickness at 1*s.* 6*d.* an hour, and forfeit him for any 'deviation'? Granted the correctness of the decision on the technical point of law, what folly is this! what pettifogging, short-sighted, and vexatious policy on the part of a great railway company, whose aim should be to consult the convenience of the public and encourage the traveller!

An execution creditor is very much like a dog with a bone, and he may well begin to growl, metaphorically speaking, at being meddled with by debenture-holders. The floating debenture permits the company to deal with the property charged in the ordinary course of the company's business. The company may sell it, or mortgage it, or charge it. Given this free hand, the company goes on and contracts debts, the unpaid creditor levies execution, and then the debenture-holders, who have been lurking in ambush all the time, start up like Roderick Dhu's 'plaided warriors arm'd for strife,' and remorselessly say to the execution creditor, 'Hand over to me the fruits of your execution. That property is mine.' This is a genuine grievance. Practically it means that creditors of a company which has issued debentures can never levy execution because when executions begin a company is water-logged, if not sinking. In *Robson* v. *Smith* ('95, 2 Ch. 119) Romer J. has indeed held that a floating debenture-holder cannot lay hands on a debt of the company which has been attached by a creditor if the company is not in winding-up or a receiver appointed. This is a crumb of comfort, but debenture-holders are rapidly filling up their 'cup.'

The Roman augurs, we know, could not look in one another's faces without a smile, and there are some matters in which English lawyers, too, exchange glances of mutual intelligence about their mysteries. The common law doctrine of accord and satisfaction—for instance, that a creditor may accept a canary or a tomtit, anything in short in satisfaction of his debt except a less amount of money—is one which it is difficult to explain to the satisfaction of the intelligent layman as an emanation from the 'perfection of human reason.' Similarly, to the uninitiated the mysterious efficacy attaching to the word 'demise' is puzzling: why it should carry a covenant for title and a covenant for quiet possession, while the simple 'let' carries only a qualified covenant for quiet possession. But so it is (*Baynes* v. *Lloyd*, '95, 1 Q. B. 820). Demise is in fact a legal fossil—one of the few words still left with a peculiar legal connotation. Substance happily now prevails over form, and

a man's rights do not depend on the right use of such words as 'grant' or 'estate' any more than on a stop or a comma. Any phraseology is enough if it clearly indicates intention. *General Assurance Co.* v. *Worsley* (15 R. (May) 357) is an illustration deciding that a notice to determine a tenancy, though imperfectly expressed, is a good and valid notice if treated as such by the parties.

An agreement by the master of a vessel in distress to pay a specified sum to another vessel for towing his own to a place of safety does not exclude the salvor's right, independent of contract, to some remuneration for the service he actually succeeds in performing, even if it falls far short of entitling him to the payment agreed upon: *The Hestia*, '95, 1 P. 193. Would a term in the agreement whereby the salvor undertook not to claim anything under the general law of salvage be upheld, or disallowed on grounds of public policy? The case suggests this further question but gives no hint for its solution.

In most contentious litigation ideal justice lies somewhere between the claims of the litigants, and is best satisfied by a compromise: only the litigants themselves do not think so. '"Budge not!" says the fiend;' and if counsel advises a compromise however advantageous, he is generally thought by his client to have given the less friendly counsel, if not to have given the client away altogether. To advocate a compromise doth compromise an advocate. *Kempshall* v. *Holland* (14 R. (May) 296) is useful in drawing attention to the fact that counsel's authority to compromise is not one at large. It is confined to matters in question in the action. This is good so far as it diminishes the responsibility of counsel, but there is an inconvenience attending such limited authority, as the case itself illustrates. For if one of the terms is outside the scope of the action, a perverse client may undo the compromise, as she—of course she—did in *Kempshall* v. *Holland*.

Prof. Maitland communicates this curious gloss from a Bracton MS. (Camb. Univ. Dd. vii. 6): 'Et nota quod de iure naturali minus curatur in Anglia quam in aliqua regione in mundo, quia Rex Anglie vocatur Dominus Marium.' This shows that the law of nations was already regarded as a branch of the law of nature, and is a very early testimony to the growth of the English king's claim to a lordship over the sea. It seems to have been written about 1327.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

PETTY PERJURY.

THE wisdom of our ancestors drew a distinction between petty larceny and grand larceny. I wish the wisdom of our modern legislators could see its way to draw a similar distinction between petty perjury and grand perjury. Theoretically and theologically all perjuries constitute one and the same offence, and this is the present view of English law. If one man wilfully and corruptly swears away the life of another in a murder trial, and another man wilfully and corruptly swears that he has repaid a loan of twopence in a county court case, each of them alike is guilty of perjury, and each of them is liable to the same punishment. But every one must feel that the two offences differ in kind as well as in degree. Perjury, after all, is merely a means to an end, and one cannot help regarding the end in view as well as the means used to obtain it. But then comes the difficulty: What line can be drawn between trivial and serious perjury? All perjury in criminal proceedings is evidently of a serious nature, but in civil cases the pecuniary amount involved offers no certain test. Take the common case of the plaintiff suing for a small debt. The defendant says that he has paid the debt, and produces a receipt. The plaintiff thereupon swears that the receipt has been forged or altered. If the plaintiff is swearing falsely he is making a serious criminal charge against the defendant. But I submit that the difficulty might be got over by leaving the matter to the discretion of the court before which the perjury was committed. Prima facie no doubt all perjury should be regarded as a serious crime; but it might be left to the court before which the offence was committed to say that it should be prosecuted and dealt with as a petty offence. There is at present a Bill before Parliament to consolidate and amend the law relating to perjury and cognate offences. The Bill deals in the first place with perjury, that is to say, false swearing in a judicial proceeding; in the second place, with false sworn declarations; and in the third place with false statements, made under statutory authority, but not under oath and not for use in any judicial proceeding. The last offence may be dealt with by a court of summary jurisdiction, unless the accused desires to have the case tried by a jury. In that event the case is to be sent to the Quarter Sessions. It seems to me that most county court perjury could be efficiently dealt with

if it were dealt with on the same lines as a false statement. What is required is a small punishment promptly inflicted. When the Bill was before the Lords Select Committee last year, I attended before the Committee and urged this view, but without success. The alteration in the law which I suggested was probably too great a change to be introduced in a Bill which is substantially a consolidation Bill. But I hope in some form, and at some future time, the subject of petty perjury will receive the attention of the Legislature. Most county court and police court perjury is a mean, petty, contemptible offence, which should be met with a small contemptuous punishment. Our ancestors would have found no difficulty in awarding such punishment. But the days of the stocks and the ducking-stool are gone for ever. Though the bulk of petty perjury could be effectually stopped by putting the offender under a pump and ducking him well, or simply painting his nose pea green, such methods are no longer within practical politics. The point I wish seriously to insist on is that, in the case of a crime like perjury, the certainty of punishment is far more important than its severity. The probability of getting fourteen days' hard labour within a week's time at the nearest police court would be far more deterrent than the bare possibility of a long sentence at the next Assizes.

It has been suggested that the court before which perjury is committed should have the power of punishing it there and then as a contempt of court. I think there are the strongest objections to this suggestion. In the first place there is a good deal of human nature in most judges, and a judge is naturally annoyed when he discovers an attempt to deceive him and to make him do injustice in the case he is trying. But punishment should not be awarded by a judge who can have any personal feeling in the matter. Again, it is a great safeguard to the accused to require the concurrence of two independent tribunals. If the judge who orders the prosecution and the tribunal which afterwards tries the case both come to the conclusion that perjury has been committed, there is little chance of injustice being done. In my own case I usually go further than this. When I think that perjury has been committed and can be proved, I order the case to be tried by a jury, and if the case comes out in the same way before the jury at the adjournment, I then send on the papers to the Public Prosecutor, asking him to form an independent opinion before taking proceedings. I am always loth to take advantage of perjury committed in a hurry. When a man finds himself cornered he is apt to blurt out the first lie that occurs to him. If the case is adjourned for trial by a jury at a future date, this gives him a proper locus poenitentiae which he

frequently avails himself of. If he deliberately repeats his false statements, his offence assumes a much graver character. For my own part, too, I recognize a wide distinction between the use of perjury as a weapon of offence and as a weapon of defence[1]. In the latter case I should be very slow in ordering or suggesting a prosecution. For instance, in cases where prisoners are allowed to give evidence, or when a witness is cross-examined as to credit, I think there would be very few instances in which I should like to take the responsibility of directing criminal proceedings. Some time ago an artisan was sued before me on a draper's bill. His wife appeared for him. After telling various obvious lies, she at last came out with her real defence. 'If you give judgment against my husband, I shall get the stick.' In a somewhat similar case a solicitor asked me if I would direct proceedings against the woman for perjury, and I told him he might as well ask me to order the prosecution of a cat for mewing. Now to take a case on the other side of the line. The wife of the defendant appeared to defend an action for drapery goods. Among the goods supplied was a velvet cloak. I asked the woman what she meant by getting such an article when her husband's wages were only twenty-seven shillings a week. She replied that she 'did not owe for that.' I asked why. She thought for a minute, and then said, 'The plaintiff gave me the cloak because he indecently assaulted my little girl.' The plaintiff, who was a respectable tradesman and married man, danced with rage. But a little inquiry showed that the accusation was absurd. Now if I could have sent the woman straight before a magistrate who could have given her fourteen days' hard labour, it would have met the merits of the case; but it would have been absurd to order a solemn assize prosecution for a mere vicious feminine lie.

Though most of the perjury committed in county courts and police courts is of a petty nature, still in the aggregate it constitutes a serious impediment to the administration of justice. One cannot make bricks without straw; and where evidence is wholly untrustworthy, a judicial decision is mere guesswork. The judge has only probabilities and not testimony to guide him. Few people, I think, realize the extent to which perjury is prevalent among the lower classes in England. I happen to have administered justice in three different countries, namely, England, Gibraltar, and India, so perhaps I have some basis of comparison. In Gibraltar there was a mixed population of Spaniards, Maltese, and Barbary Jews, but there was

[1] Perhaps divorce proceedings best illustrate the distinction. An unfaithful wife who denies her guilt uses perjury as a weapon of defence, while the hired witness who falsely swears away the reputation of an innocent woman uses perjury as a weapon of offence.

nothing to complain of in the way of perjury. In India, no doubt, there was a good deal of lying, but many of the lies were of a stereotyped form (like fictitious averments in pleading), and I certainly think it is harder to get at the truth in an English county court than it was in a North-West cutcherry [1]. In the High Court a higher grade of witnesses is reached, and perjury is comparatively rare. Moreover, a witness who will freely commit perjury in a money matter will hesitate to do so in a criminal cause. Wales has not a high reputation for truth-telling, but if I may judge from a single circuit, the Welshmen are no worse than their neighbours. With one exception, I was struck with the careful honesty of the witnesses all round the circuit. The exception unhappily is not peculiar to Wales. I refer to false charges under the Criminal Law Amendment Act, made by dirty little girls. Out of nine cases committed for trial, there was only one conviction, and I was satisfied that the acquittals were right. It is horrible to think of the misery that must have been endured by innocent men through the lies of these nasty little wretches. It would be well if the jury, in such cases, could add a rider to the verdict of 'Not guilty,' when they were satisfied that the charge was false and malicious. In such case the judge should probably be empowered to send the prosecutrix to a reformatory. The merits of the case would be still better met if the girl could be well whipped by a stalwart prison matron, but mawkish modern sentiment would be opposed to so sensible a procedure. Reverting now to the extent of county court perjury, some time ago I took a note of a hundred consecutive cases for less than £20 tried before me at Birmingham [2]. I found there was hard cross-swearing in sixty-three. Of course there is much hard swearing which is not perjury. Memory is a treacherous faculty; and I think also that witnesses often talk over a case beforehand, and at last come to mistake what they have said or been told for what really happened. Again, in a running down case, truthful witnesses may often give diametrically opposite accounts of the accident. The fact is that no one's attention is called to what is passing until the accident happens, and the witnesses have to describe events they were not at the time attending to. My county court experience is mainly confined to Birmingham, but I have no reason to believe, and I do not believe, that Birmingham is worse than other large urban courts. If that be so, after making all allowance for hard swearing which is not perjury, there remains a terrible

[1] Ancient Hindu law, it is said, allowed perjury in two cases; first, to get a friend out of trouble; and, secondly, in any matter relating to a woman, because, as the lawgiver observes, that is necessary for domestic peace.

[2] In the cases over the £20 limit I find there is much less perjury than in the small cases.

residuum of wilful and corrupt perjury, which urgently calls for a remedy if the administration of justice is not to be reduced to a farce.

There is another ground on which I should like to see petty perjury dealt with summarily. Unfortunately the cases in which perjury can be proved are generally cases of a somewhat mild character. The worst cases get off scot-free. It seems somewhat hard to send a man to the Assizes for perjury, when perhaps the same day a dozen witnesses have committed perjury of a much more aggravated kind, and yet nothing can be done to them. The offence is a difficult one to prove, and a witness doubtless regards it as his misfortune and not his fault when it can be fully proved. Let me give a couple of instances to illustrate my meaning. In the first case the plaintiff's traveller called at a small shop for payment of a debt. The debt was not paid, and he reported the matter that night to his master. The traveller called again on his next journey. The defendant then set up that he had paid the debt, and that the traveller had got back the receipt by a trick. When the case was tried the defendant called six witnesses to prove the payment. The traveller was a man of twenty years' experience and good character, and it is pretty obvious that a man of that sort would not commit his first theft in the presence of six witnesses. But of course it would be impossible to get a conviction in such a case. A jury would not have convicted either party. In the second case the plaintiff's trap was run into by an omnibus. According to the plaintiff's story he called on the defendant the next day and asked for compensation. The defendant told him it was no use his trying to get compensation, as he belonged to an association and could bring fifty witnesses whenever he pleased. The plaintiff then brought his action. His case was that he was driving along quietly, close to the curbstone, on his proper side, and that the omnibus crossed over and ran into him, and further that at the time of the accident there was no other vehicle within sight. His story was corroborated by two or three apparently credible witnesses. The defendant then called eighteen witnesses to prove that the plaintiff was racing another trap, and that in trying to pass it he ran into the omnibus. The jury found for the plaintiff without a minute's hesitation. Now if they were right the discrepancy in the two stories can only be explained by wholesale perjury and subornation of perjury. If the jury were wrong the plaintiff must have committed perjury. A man cannot be mistaken as to whether he is driving alone or racing another trap. But a prosecution would be impossible in such a case, as long as the witnesses all stuck together.

If my suggestion of a summary remedy for perjury were adopted,

I think it would require to be safeguarded by a provision that no prosecution for perjury should be commenced without the leave of either the court or some public official such as the Attorney-General or Public Prosecutor. If the procedure be made simple and easy there would be a danger of its being abused by vindictive people, and respectable witnesses might be deterred from giving evidence. Even as the law stands now, a large number of the prosecutions instituted by private prosecutors are of a vexatious or blackmailing character. Perjury is essentially an offence against public justice, and its prosecution should be determined on by some independent public official.

In connexion with the subject of perjury there is a further amendment in the law which I think would be beneficial. I refer to the abolition of the oath in civil proceedings. As far as I can judge an oath has no longer any religious sanction for the masses. A county court witness swallows an oath as easily as an oyster, and the administration of the oath becomes an irreverent farce. A cynical friend of mine suggests that though the religious instinct be dead among the people, the sporting instinct is happily very much alive, and might be utilized in the cause of truth. In county court cases he would substitute a shilling bet for the present oath. The witness, instead of being made to swear, would be made to bet a shilling that he would speak the truth. No doubt a much greater proportion of truthful evidence might be obtained in this way, and a great deal of useless profanity might be avoided; but the Anti-Gambling League, like the poor, are always with us, and my friend's plan is not feasible. For myself I should like to see a simple declaration substituted for the oath, with a reminder that the witness was liable to be punished for perjury if he did not speak the truth [1].

M. D. Chalmers.

[1] I am bound to say that witnesses sometimes pay this much respect to the oath.—They try to kiss their thumbs instead of the book, but I am not clear whether they think to avoid thereby the spiritual or the temporal pains of perjury.

PROPERTY, THINGS IN ACTION AND COPYRIGHT.

MR. SPENCER BRODHURST, at the end of his interesting article, intituled 'Is Copyright a Chose in Action?[1],' which appeared in the January number of this REVIEW, submits that copyrights, patent rights, *and rights of all kinds*, if they must be classed as property at all, should be classed under the head of property in constructive possession. And the learned editor, in a note at the end of the article, agrees that, if copyright must needs be a thing either in action or in possession, it must be in possession. Sir Howard Elphinstone, too, has expressed his opinion that copyright is probably not a thing in action[2]. I venture to argue, however, that copyrights and similar rights are more analogous to choses in action than to choses in possession; and to suggest that if such rights must be forced to fit in with a classification of things as being in possession or action, they should be pushed into the class of things in action. The question is one of practical importance; mainly because things in action generally are not to be deemed goods within the meaning of the 'reputed ownership' clause of the present Bankruptcy Act[3]; and if copyrights are not comprehended in the terms of this exception, it appears that they are goods within the meaning of the clause[4].

Mr. Brodhurst takes exception to the use of the term 'chose in action' to signify incorporeal things, such as rights[5]. He apparently considers that the word 'thing' ought only to be used in the sense of tangible thing, denies that a right can have any value, and submits that rights are not in reality *property* either in action or in possession[6]. To these contentions it may be replied that, in the current language of English law, the use of the word 'thing' is not limited to tangible things[7], the term 'things in action' is used to denote incorporeal things, rights are said to be valuable, and valuable rights are included in property. And it is submitted that, in arguing questions of English law, we are bound to accept the ideas which have obtained currency therein, with

[1] L. Q. R. xi. 64, Jan. 1895.
[2] L. Q. R. x. 314, 315.
[3] Stat. 46 & 47 Vict. c. 52, s. 44.
[4] *Longman* v. *Tripp*, 2 B. & P. N. R. 67, 9 R. R. 617; *Exp^te Foss*, 2 De G. & J. 230.
[5] L. Q. R. xi. 69.
[6] L. Q. R. xi. 70.
[7] Co. Litt. 6 a and n. (3), 121 b; 3 Rep. 2 b.

regard to the nature of rights, legal relations and things; however repugnant those ideas may be to the exponents of what is known as analytical jurisprudence.

It may be admitted that in law the word 'thing' has primarily the sense of tangible thing[1]; but the use of the word in this sense in English law is exactly what prevents it from having the same sense as a part of the expression 'thing in action.' And it may be asserted not only that things in action are essentially incorporeal things, but also that almost all incorporeal things are essentially of the nature of things consisting in action. For what is the true ground of the distinction in English law between corporeal and incorporeal things[2]? I venture to say that the contrast is simply between things which man may *have* in his own possession or keeping, and things which are matter of law. These are little else than things for which a man must go to law[3]. Corporeal things are those which a man may keep safe for himself, which he may use and enjoy, and of which he may take the fruits and profits, without going to law for aid; as land or cattle. Substantial things like these are what is primarily meant by the word things. And property, in the strict sense of the word, cannot exist apart from the possession of corporeal things[4]. Property, no doubt, includes some matter of law; for a possession which is not protected by a legal remedy in case of its violation can hardly be said to have attained the dignity of property. Full ownership seems to

[1] For proof the reader is referred to Professor Maitland's article on the Mystery of Seisin, L. Q. R. ii. 481; Professor Ames's articles on the Disseisin of Chattels, Harvard Law Review, iii. 23, 313, 337; and the learned editor's article, intituled 'What is a Thing?' L. Q. R. x. 318.

[2] As is well known, this classification was borrowed by Bracton from Roman law, and is in English law chiefly applied to hereditaments, or things, which may be inherited. It is not, however, confined to real things, as there are such things as incorporeal personal hereditaments. In this case, as in the case of the classification of actions as real or personal, Bracton borrowed the terminology of Roman law: but he and other English lawyers supported and explained the application of the borrowed terms by reasons drawn from English not Roman law. See Bract. fo. 10 b, 52, 53, 220 b, 221; Co. Litt. 6 a, 19, 20; 2 Black. Comm. 20; *Aubin* v. *Daly*, 4 B. & A. 59; and an article by the writer in L. Q. R. iv. 394.

[3] This, I venture to say, is the English sense of *ea quae in jure consistunt*, the Roman explanation of incorporeal things; *right* in English law meaning especially a claim enforceable at law, that is, a claim which must or may be pursued by action; see Bract. fo. 98 b; Litt. s. 451; Co. Litt. 265 a, 285 a, 291 b, 345; Finch L. 106.

[4] See note 3 to p. 227 below. That ownership is inseparable from the actual possession of corporeal things appears when we consider that our law will not support a claim of ownership apart from a claim to the possession of lands or goods. There is no action known to the common law in which such a claim can be maintained. Dispossessed owners of goods have no remedy except to bring actions asserting their right to possession of the goods, and their success will depend on their proving such right. Even real actions, including the very writ of right itself, were simply actions to recover possession of land; and without right to possession they could not be maintained; see Bract. 434 b, 437 b; Finch L. 258; 3 Black. Comm. ch. x. and App. i. Nor can a man prescribe to have the ownership of a corporeal thing; Plowd. 170; see Litt. s. 310; Co. Litt. 195 b.

imply not only freedom from the legal claims of others upon the thing owned, but also the benefit of a duty imposed by law on all to refrain from interference with the possession. But there is much in property which cannot be said to consist in right; which is, in a manner, independent of law. It is of the essence of property to have the thing owned in your own keeping [1], and so to be able to use or dispose of it as you will, free from restraint of law [2]. For example, if I am ousted from my lands, or my goods are taken away from me, I am left with nothing but a right to have them; that is, I may have to depend on law to get them back again. But when the law has given me back mine own, then I have the corporeal things to keep for myself, and no longer depend on law. Then I have pursued my right to its end, the point where claim [3] is transformed into substance [4]. When I am in possession, the law leaves me free to exercise as I will the physical powers consequent on having the thing in my own keeping. Thus I may put my oxen to the plough, or kill and eat them as I will. I may sell them or give them away [5]. If my land is truly free from others' claims thereon [6] (as of *profits à prendre*, easements, &c.), I may cultivate or waste it as I like. I may keep out others with walls and bars. My house is my castle. I need open to none, not even to the king's officer, the representative of the law, if he comes only

[1] To have a thing in your keeping is to have it in your custody or ward, to keep others out of it; to keep and to keep safe is all one; see *Southcote's* case, 4 Rep. 83 b.

[2] How largely ownership consists in actual possession appears upon consideration of the principle of our law, that any actual possession of things is prima facie unrestricted; that the possessor of a thing is presumed to have the fullest ownership which the law allows. Thus an estate by wrong is always an estate in fee simple; see Williams on Seisin, 7, 8; *Leach* v. *Jay*, 9 Ch. D. 44. And in a common recovery a fee simple was recovered without the use of the word 'heirs'; 'for regularly every recoverer recovereth in fee simple'; Co. Litt. 9 b. So those who acquire goods by occupancy obtain the full ownership of them. And finders or wrongful takers of goods may, if dispossessed, recover them from all, except persons rightfully entitled, on the ground that their actual possession of the goods gave them a title against all, except such persons; *Armory* v. *Delamirie*, 1 Str. 505, 1 Sm. L. C.; *Basset* v. *Maynard*, Cro. Eliz. 819, 820; *Woodson* v. *Xawton*, 2 Str. 777; *Rackham* v. *Jesup*, 3 Wils. 332.

[3] See Co. Litt. 291 b, as to the meaning of *claim*.

[4] That substance is equivalent to property, see note 6 to p. 227 below.

[5] Consider also the physical power enjoyed by any possessor of land of making of a feoffment in fee with livery of seisin; and the peculiar consequences, at common law, of such a feoffment if made by one not seised in fee simple; see Litt. ss. 592–599, 611; Co. Litt. 330 b, and n. (1).

[6] Of course no land in England, unless in the hands of the crown, is free from the lord's claims thereon; and in the days of military tenures lords' interests were substantial. But the freeholder seised of the land has always been regarded as the owner. He has the land, while the lord has only a bare incorporeal hereditament. The freeholder alone could alien the land by feoffment, and was the proper person to sue for recovery of the land if ousted. No question of waste could arise between lord and tenant in fee or in tail; except, indeed, of the *lord's* waste during a wardship in chivalry. And a lord has in general no right to enter on his tenant's land, and cannot break open the house-door to distrain for his services; see Bro. Abr. Trespass, pl. 16, 226, 273, 384; Litt. s. 553; Co. Litt. 52 b; 2 Inst. 105; Finch L. 134; and next note.

to vex me with civil process at suit of a fellow subject[1]. I may build high walls to prevent others from looking in at me[2]. So long as I suffer nothing noisome to escape my boundary, and do not endanger my neighbours' lives, health or property, I cannot be restrained in my use of my land[3]. The effect of the natural use of my land may be to deprive my neighbour of an advantage: but I may continue such use, even though I do so maliciously, without profit to myself, and simply with intent to do him harm[4]. I need not go to law even to maintain myself in possession. If an intruder refuse to go out on request, I may lay hands upon and gently but forcibly eject him. If others forcibly break in, I may forcibly turn them out[5]. Such, I submit, is the nature of property.

How different is the nature of incorporeal things! They are mere *claims*[6] to have things (in the primary sense) which others possess, or upon things, which others possess, or to have things or services rendered by others. They are claims which may be satisfied by acquiescence therein, but which, if disputed, can only be enforced by going to law. They are incorporeal, because one, who has only a claim, has no thing (in the primary sense) which he can keep safe for himself; he can only look to law for security, that is, he has mere *right*. Such things cannot be seized or taken. Of some of them, however, there may be a perception of the profits; as in the case of a rent or a right of common of pasture. Of things, which have this quality, there may be a kind of possession; since they result in something which may be transformed into substance. But they are not capable of such realization as shall result in the extinction of the right. The accessory right may be transformed into substance, as by payment of an instalment of rent. But the principa' thing remains something which you can never *have* to keep for yourself; a mere claim still liable to be disputed. It is true that if your claim has once met with substantial acquiescence, the law will give you a remedy to ensure its satisfaction in future. But you must always go to law to enforce it; your right still remains your only security.

There are, however, certain claims, to enforce which you are not obliged to go to law; but which may be satisfied by taking some *thing* for yourself. These appear to be of two kinds: claims which are extinguished and transformed into substance by the taking of

[1] *Semayne's* case, 5 Rep. 92 b; *American Concentrated Meat Co.* v. *Hendry* (1893), 9 Times L. R. 340, 445, 5 R. 331.

[2] See *Tapling* v. *Jones*, 11 H. L. C. 290, 305, 311.

[3] See 1 Seton on Decrees, 524 et seq., fifth edition.

[4] See *Giles* v. *Walker*, 24 Q. B. D. 656; *Corporation of Bradford* v. *Pickles*, '95, 1 Ch. 145.

[5] *Green* v. *Goddard*, 2 Salk. 641; *Weaver* v. *Bush*, 8 T. R. 78.

[6] See note 3 to p. 225, ante.

the thing; and claims which are only partially satisfied by the taking, and still remain as things, which you must go to law to enforce. Rights or titles[1] to land, which may be asserted by entry, and rights to goods, which may be asserted by taking, are instances of the former kind. Rents recoverable by distress are examples of the latter. Claims of the former kind have given rise to an extension of the use of the word *property*, at least as regards goods[2]. For when the owner of goods parts with or is deprived of their possession he no longer has property in the strict sense of the word. He is left with mere right of property[3]. The use of the word *property* was, however, extended so as to include the mere right of one who had bailed goods so that he might at any time retake them, or from whom goods had been wrongfully taken[4]. In other words, it was recognized that a man might have property in goods, although he had no *thing* in possession, if he had a good claim to take some particular *thing* for himself out of others' possession[5].

But the widest sense of the word *property* is that of valuable things; and amongst such things mere rights are included, if valuable in money[6]. Claims resulting in regular profit, as rents,

[1] See note 1 to p. 229 below.

[2] The same principle has worked with even more marked results in the case of land. Thus the freeholder is seised, as of a corporeal hereditament, of land held by a tenant for years, or a copyholder.

[3] Thus the property in goods wrongfully taken was said to be in the taker; 27 Ass. pl. 64; Y. B. 8 Edw. III. 10, pl. 30; 2 Hen. IV. 12, pl. 51; Finch L. Bk. iii. ch. 6. And in Y. B. 6 Hen. VII. 9, pl. 4, Brian C.J. gave his opinion that if goods are wrongfully taken from their owner, the property is divested, and he has nothing but mere right of property. So a disseisee of lands has only bare right to the lands, and no estate or interest therein; see Litt. ss. 450, 451, 455; Co. Litt. 266 a, 267 a, 369 a, 374 b.

[4] See per Needham J., Y. B. 2 Edw. IV. 5, pl. 9; Y. B. 15 Hen. VII. 15, 16, pl. 6; Moore, 19, 20, pl. 67; 1 Hale, P. C. 513.

[5] This left without the pale of property the right of an owner who had temporarily parted not only with possession of his goods, but also with all right to take them, as upon a letting for hire or a pledge. Thus in *Wood* v. *Foster*, 1 Leon. 42, 43 (a case to which my attention was called by Professor Ames), Windham J. said that if I let certain sheep to one for two years, now upon that lease somewhat remains in me, but that cannot properly be said a property, but rather the possibility of a property, which cannot be granted over. It was held, however, by the Court of Exchequer in *Franklin* v. *Neate*, 13 M. & W. 481, reversing the ruling of Parke B., at Nisi Prius, that a pledgor of goods retains a property therein, which he can sell. This decision was no doubt a departure from the principles of the earlier law: but it seems consistent with the mercantile spirit of the modern common law, which permits the sale of goods at sea, although they may be subject to a lien for freight, and allows one who has purchased but not paid for goods to acquire the property therein subject to the vendor's lien for the price, and even to resell them (i.e. to transfer his property to another) subject to such lien; see *Lickbarrow* v. *Mason*, 1 Smith L. C.; *Sanders* v. *Vanzeller*, 4 Q. B. 260, and cases there cited; *Dixon* v. *Yates*, 5 B. & Ad. 313; Benjamin on Sale, Bk. v. ch. 2, pp. 632–641, second edition.

[6] See the cases cited in a former article by the writer in L. Q. R. x. 146, notes 1 and 2. Thus Lord Mansfield remarks (Cowp. 307), 'What is substance? It is every property a man has. . . . Real and personal effects are synonymous to substance, which includes *everything that can be turned into money*.' So Austin (Jur.

were early recognized as valuable, and capable on that account of being included in *assets*, or property of equal value to charge an heir with his ancestor's specialty debt, or to bar an issue in tail by lineal warranty[1]. It was not, however, until modern times that claims not capable of producing immediate profit became generally valuable. For it was only under modern law that mere rights or claims were allowed to be transferred with comparative freedom[2]. Freedom of transfer made them saleable, and therefore valuable. Furthermore, it endowed them with the possibility of transformation into substance. As we have seen, in the case of purely incorporeal things where there is a continuing claim, the mere right can never be extinguished by the reduction of some *thing* into possession. But if such rights be transferable, they may be transformed into substance by being exchanged for the ownership of money[3].

If we examine the nature of things in action, we shall soon see that they are merely claims enforceable at law; and that a man entitled to a thing in action has no *thing* (in the primary sense), and has not even anything which he can take. For example, in the case of a chose in action proper, as a debt, what is the thing, which is or lies in action, and which the person entitled thereto is said to have? It cannot be anything tangible, for the contracting of a debt (otherwise than by judgment and except to the crown) gives the creditor no interest whatever in, or charge upon, any money or other property of the debtor[4]. If the debtor refuse payment, the creditor cannot take the amount due to him out of the debtor's money without committing theft; he has no legal remedy but to sue the debtor. When a debt is paid, the creditor ceases to have a chose in action: but the true effect of payment is not that the thing, which he had before in action, is handed over to him and so becomes a thing in possession. It is that the debtor's obligation is discharged and extinguished[5], and the former creditor (if paid in cash) acquires the ownership of certain coins,

819, fourth edition) points out that obligations, or rights against determinate persons, are included in a man's *property* in its widest sense, as being applicable to the discharge of his debts. Savigny, too, after showing that an obligation is a right to restrain another's freedom of action, points out that it resembles ownership, in that it is capable of valuation in money, which is nothing else than transformation into the ownership of money; System des heutigen römischen Rechts, vol. i. s. 53, pp. 338–340.

[1] See Co. Litt. 374 b; 6 Rep. 58; *Robinson* v. *Tong*, 3 Vin. Abr. 145 (Assets, pl. 28).

[2] It will be sufficient to mention the freedom of assignment of mere rights given by the bankruptcy law; the abolition of the necessity of attornment to the validity of grants of reversions; the equitable rule allowing of the assignment of a possibility for valuable consideration; and the freedom acquired in modern law of assigning things in action by power of attorney.

[3] See note 6 to p. 227 above.

[4] Turner [L.J., *Johnson* v. *Gallagher*, 3 De G. F. & J. 519, 520; James L.J., *Pike* v. *Fitzgibbon*, 17 Ch. D. 461.

[5] Bract. fo. 101 a.

in which he previously had no interest at all. The thing therefore which lies in or is to be exacted by action, and which the creditor has, appears to be no tangible object, but to be the debtor's duty to pay the amount owing. That is to say, what the creditor has is the right to enforce an obligation, which has always been considered to be an incorporeal thing. The incorporeal nature of a debt is emphasised by the fact that the obligation to pay may be discharged by the debtor's bankruptcy. That the right which constitutes a debt is valuable is sufficiently apparent from the fact that people are found to pay money for its transfer to them. That the right is property is proved by the fact that it will pass under a bequest of all the creditor's property, or to the trustee, on the creditor's bankruptcy.

Again, if a man have a right to recover lands or goods by action, he has no doubt something lying in action: but what is this thing? The matter appears to stand in this way. The law regards a rightful title[1] to recover lands or goods as a right distinct from and antecedent to the remedy for asserting the title[2]. The effect of this title is that any one who is wrongfully possessed of the land or goods is bound to render the same to the person entitled. It is only upon the *breach* of this duty that a cause of action to recover lands or goods arises[3]. And the action is brought, not, as Mr. Brodhurst suggests, for an acknowledgment that the title or

[1] I hope it will not be considered impertinent if I remind the reader that *title* to land especially means a claim to enter land for some cause, which is not a cause of action, as upon forfeiture for condition broken or alienation into mortmain; while right to land without possession, but with remedy by action, was especially termed *right*: but that title was also used in a wider sense, including right; Co. Litt. 345; Finch L. 106. I use the word in the wider sense in the text. Here it may be noted that Mr. Brodhurst (L. Q. R. xi. 69) states that in 10 Rep. 48 there seems to be a distinction drawn between rights and things in action; on the ground, apparently, that Coke there says that rights, titles, and things in action shall not be assigned to strangers. It is obvious, however, that Coke here uses the words *rights* and *titles* in the strict sense above mentioned, and that by things in actions he means things in action proper, i. e. rights arising out of a cause of action and capable of release. For shortly after he points out that all rights, titles, and actions may be released to the terre-tenant.

[2] Thus where title to land might be asserted by entry, a release of all real actions to the terre-tenant was no bar to the exercise of the right of entry, and a release of all personal actions to the wrongful possessor of goods did not prevent the owner from retaking them; Litt. ss. 496-498. So if a disseisor made a lease for life with remainder in fee, or enfeoffed two jointly in fee, a release by the disseisee of his right to the tenant for life, or one joint tenant, would enure for the benefit of the remainderman or other joint tenant; but if the release were of all real *actions* only, the disseisee would not be barred from bringing a real action against the remainderman or other joint tenant surviving; Litt. ss. 470-472; Co. Litt. 275 b, 285 b, 286 a; 8 Rep. 152; 10 Rep. 51 b. And the old statutes for the limitation of real actions barred the remedy but not the right to the land; *Hunt* v. *Burn*, 2 Salk. 423.

[3] This appears from the words *Praecipe quod reddat*, &c., *et, nisi fecerit*, &c., *summone eum*, &c. in the original writ in real actions in the King's Court and in detinue; Glanv. i. 6, x. 2, 13; Reg. 139, 227 et seq.; F. N. B. 5 I. 138, 207 H.; Finch L., 257; 3 Black. Comm. App. 1, § 4; and see Bract. fo. 99 a, 102 a; Litt. ss. 495, 499, 691, 692; 8 Rep. 151 a; 10 Rep. 51 b, and note 2 to next page.

the right of action to recover the land or goods exists, but to give effect to, or realize the benefit of, that right or title. Now it appears that a chose in action pure and simple is a thing, which must arise out of some good cause of action, and must be capable of being released by a release of actions[1]. Every cause of action at the common law must be against some particular person[2]; and, as we have seen, cause of action to recover lands or goods is the breach of an obligation to render the same. You cannot take or seize the benefit of a right of action to recover lands or goods[3], any more than you can *take* the benefit of any other obligation[4]. It must therefore be an incorporeal thing. And right of real action and right to land are plainly shown to be incorporeal things, because they might be released to the terre-tenant by deed[5]. And everything which can be released by a release of personal actions must be incorporeal.

A thing in action then is properly the benefit of an obligation arising from a breach of some antecedent duty[6]. It would also appear to be the benefit of some real, mixed or personal action, that

[1] *Diggs's* case, Moore, 133, pl. 279; Litt. ss. 512, 513; Co. Litt. 292 b; and see notes 1 and 2 to preceding page.

[2] Real actions must have been brought against the tenant of the freehold; see Litt. ss. 495, 661; Co. Litt. 286 a, 349 b; 8 Rep. 151 b. Personal actions must obviously be brought against a particular person. It is worthy of note that *right* to land with *remedy* by action (note 1, last page) was *jus in rem*, giving rise to a right to sue the tenant of the freehold for the time being, without regard to the means whereby he became seised: but right of real action is *jus in personam*. Thus if a disseisor made a feoffment, after which the disseisee released all real actions to him, the disseisee was not barred from bringing a real action against the feoffee; for as the disseisor was not the terre-tenant at the time of the release, the disseisee had no cause of *real* action against him, and the release was simply void. Indeed, even if the release had preceded the feoffment, the feoffee could not plead it, for he was not privy to it. This plainly shows the personal nature of a right of real action. It has also been said that a release of real actions by a disseisee to a disseisor seised is no bar to a real action by the heir of the disseisee, because a right remained, which might descend to the heir; or to a writ of entry in the *per* and *cui* by the disseisee himself against the heir of the disseisor, because that action was not *in esse* at the time of the release. See Litt. ss. 494, 495, 499; Co. Litt. 285 b; 8 Rep. 152 a; 10 Rep. 51 b. In *Winchester's* case, 3 Rep. 2 b, 3 b, the judges held that right to land with remedy by action only was a *thing* consisting in privity (meaning, it seems, that it could be asserted only by action against some person, i.e. the tenant of the freehold for the time being); and they called it a right, which consists only in action. They also held that a remainderman after an estate tail, who might bring a writ of error to reverse a common recovery, had no *right*, the writ of error being a bare action, which consists more in privity than an action which is accompanied by a right. This authority sufficiently answers Mr. Brodhurst's contention (L. Q. R. xi. 69) that rights cannot properly be included in the term things in action. Real actions were abolished in 1833; Stat. 3 & 4 Will. IV. c. 27, ss. 36–39. But as the test of obtaining relief under the present practice is whether the plaintiff has a good cause of action, it is still material to consider the nature of a cause of action to recover lands.

[3] Where a man entitled to land was put to his action, his entry was unlawful; see Litt. ss. 385 et seq., 592 et seq., 691, 692, 696; Co. Litt. 363 b, 364 b.

[4] Ante, p. 228.

[5] Litt. ss. 444, 447, 466, 495, 515, 519, 521, 531, 534; 10 Rep. 48.

[6] Ante, p. 229.

is, of an action brought for the realization of some right, which is valuable as tending to result in the ownership of land, goods or money [1]. In common parlance upon legal as upon other subjects, men are not scrupulous of accurate expression, and will always take a short way; so we speak indifferently of actions to recover land, goods or money, or even allude to money recoverable by action only as a thing in action [2]. But that does not alter the nature of things in action, or cause them to be anything but mere rights, not included in property in the strict sense of the word, because that is confined to the ownership with possession of tangible things, but comprehended in property in its widest sense, because valuable as being possibilities of property in the narrow sense [3].

The term *chose in action* has, however, been extended to other things than things arising from some cause of action. Thus it has been applied to the benefit of an obligation arising from contract, whether resulting in the payment of a sum certain or sounding in damages only, although no action can be maintainable before breach of the obligation [4]. And the benefit of a claim to enter upon lands has also been numbered among things in action, whether the cause of entry were a cause of action or not [5]. The reason appears to be that such benefits are things which, if wrongfully withheld, you must bring an action to realize, in other words, which you must go to law to secure. Government stock and shares in joint-stock

[1] See Litt. ss. 500, 503; Co. Litt. 288 b, 289 a.

[2] Mr. Brodhurst vouches the authority of Paston J. for using the expression *chose in action* of a corporeal chattel—a box containing deeds (L. Q. R. xi. 69); but he makes no attempt to explain what Paston meant. As far as I can understand the very difficult and apparently corrupt language of Y. B. 9 Hen. VI. 64, pl. 17, it was pleaded that W. H. had granted to J. P. a box of deeds, of which T. R. was in possession to the use of W. H. Paston J. objected that it was not alleged that W. H. was the owner of the deeds and, for aught that appeared, he might himself have been only a bailee. If so, after his sub-bailment, he would have but a thing in action (meaning, apparently, nothing but the benefit of the sub-bailee's obligation to return the box to him); and the gift of such a thing would be void. Again, Mr. Brodhurst says that in *Franklin* v. *Neate*, 13 M. & W. 481, Parke B. ruled at Nisi Prius, 'that the subject-matter of the action, a pledge, was a thing in action,' and claims this as an authority for applying the term thing in action to a corporeal chattel. But on referring to the report, we find that what is stated is that it was contended that no property passed by the sale of a chattel in pawn; it was merely an assignment of *a right of action*, with an equity of redemption; and that Parke B. was of that opinion. And that the thing in action which a bailor has is *not* the tangible chattel bailed appears clearly from this:—If a bailor entitled to the return of his chattel release to the bailee all personal actions, what passes by the release cannot be the tangible chattel, for the bailee has it already; nor is it the right of ownership of the chattel, for that remains in the bailor, and enables him to take his chattel, notwithstanding the release; but it is only the bailor's right to enforce by action the bailee's duty of restitution; Litt. s. 498.

[3] See pp. 224, 227 above.

[4] See Litt. s. 514; Co. Litt. 144 b, n. (1), 292 b; 2 Black. Comm. 397, 436; *Exparte Ibbetson, Re Moore*, 8 Ch. D. 519; *Brice* v. *Bannister*, 3 Q. B. D. 569; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

[5] Finch L. 107; Shep. Touch. 231; see note 1 to p. 229 above.

companies have also been included in the class of things in action, partly on the ground that they are analogous to obligations arising from contract, partly because they are incapable of manual seizure[1]. A chose in action then, in the extended sense of the word, would seem to be a thing which, if wrongfully withheld, you must bring an action to realize; a thing which you cannot take[2] but must go to law to secure. Let us see if the term, so extended, is applicable to copyright.

What sort of a thing is copyright? Mr. Brodhurst maintains that it is a threefold right, namely, the right to publish a work, to make copies of it, and to prevent others from doing so. It is submitted, however, that publication and making copies of a work are acts which may be done, independently of copyright, in pursuance of the common liberty of action which the law allows, and that copyright is essentially the *exclusive* right or monopoly of making copies of a published work; that is to say, it is the right to have all other persons refrain from making copies of that work[3]. It is thus a right to a *duty* of forbearance, though not, as in the case of an obligation, on the part of a particular person, but by all. It confers no interest in any tangible object, but merely imposes a restriction on others' freedom of action. If the duty so imposed be not rendered, how can it be exacted save by action against infringers of the monopoly? On this ground, may not copyright be said to be a thing in action?

No doubt copyright cannot be a thing in action in the strict sense of the word, because, as Mr. Brodhurst and the editor point out, there is no cause of action before infringement of the copyright. But the absence of a cause of action seems to be no objection to classing copyright as a chose in action in the wider sense. Of such

[1] See *Wildman* v. *Wildman*, 9 Ves. 174, 177, 7 R. R. 133; *Humble* v. *Mitchell*, 11 A. & E. 208; *Colonial Bank* v. *Whinney*, 30 Ch. D. 286, 11 App. Cas. 439, 446, 447.

[2] You can, of course, take the benefit of a right or title of entry: but this does not appear to consist merely in action, and the fact that it should have been included in things in action only shows how widely the term has been extended.

[3] See the definitions of copyright given by Lord Mansfield in *Millar* v. *Taylor*, 4 Burr. 2396, in the successful argument in *Donaldson* v. *Beckett*, 2 Bro. P. C. 134, by Pollock C.B., in *Chappell* v. *Purday*, 14 M. & W. 303, 316; by Crompton J., Alderson B., Parke B., Pollock C.B., Jervis C.J., and Lords Cranworth, Brougham, and St. Leonards in the great case of *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815, 847, 912, 920, 935, 944, 955, 962, 977, 978; and by Stirling J., in *Warne* v. *Seebohm*, 39 Ch. D. 73, 80, 81. It is true that Erle J., in *Jefferys* v. *Boosey*, 4 H. L. C. 871, submitted that copyright was not a personal privilege in the nature of a monopoly. But the weight of authority is clearly against this opinion. And the decisions of the House of Lords in *Donaldson* v. *Beckett*, 4 Burr. 2408, 2 Bro. P. C. 129, and *Jefferys* v. *Boosey* established as law the rule that the common law gives an author no monopoly of reproducing his published work. And although the early history of copyright (as to which see 4 Burr. 2366–2398; Scrutton on Copyright, ch. i.) may be thought to point to a different conclusion, that rule is nevertheless the law of the land. An author's exclusive right of producing his unpublished compositions (lately vindicated in *Caird* v. *Sime*, 12 App. Cas. 326) is distinct from copyright; see 12 App. Cas. 343.

a chose in action copyright seems to have the proper characteristics. You cannot take the monopoly given by copyright, and you must go to law to secure it. It is a claim on other persons' conduct; so is the benefit of an obligation. If it be objected that copyright cannot be a chose in action, because it is a claim available against all persons generally, it may be answered that right to land with remedy by action only has been judicially declared to be a thing consisting only in action; and this, as we have seen, is *jus in rem* [1]. And copyright cannot consist any the less in action, for that it is only a right to others' forbearance and not the right to recover a tangible thing. It has been already shown that in all cases the thing which is or lies in action is essentially the duty [2].

Mr. Brodhurst refers [3], in support of his argument that copyright is a thing in constructive possession, to the fact that the law regards certain incorporeal hereditaments as capable of being possessed. But he omits to tell us that to acquire possession of an incorporeal hereditament meant something more than to acquire a title thereto by grant. It meant, as has been already noticed [4], to take the fruits or profits of the right or to exercise the same by user. This is well shown in Professor Maitland's article on the Mystery of Seisin in the second volume of this REVIEW, where he points out that it was conceived in the old law that in order to gain possession of a mere right, you must take the esplees or profits, or *exploit* your right [5]. Thus no action lay for the recovery of a rent seek unless the grantee had acquired seisin thereof by receipt of some parcel of the rent [6]. And possession of an advowson in gross could not be gained without exercising the right of presentation [7]. Let us see whether this doctrine can be applied to copyright. At first sight it is not very easy to point out how copyright can be susceptible of any such possession as the law recognized in the case of incorporeal hereditaments. Can the proprietor of a copyright be said to exploit his

[1] See note 2 to p. 230 above.
[2] See pp. 228–230 above.
[3] L. Q. R. xi. p. 73.
[4] See p. 226 above.
[5] L. Q. R. ii. 481, 490–495.
[6] Litt. ss. 217, 218, 233, 235, 236, 341; Co. Litt. 160 a; and see 6 Rep. 58. It may be interesting to point out that this doctrine does not appear to be obsolete. Since the abolition of real and mixed actions, the grantee of a rent has been allowed to bring an action of debt for his arrears against the terre-tenant; *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Re Blackburn, &c. Building Society, Exparte Graham*, 42 Ch. D. 343; *Searle* v. *Cooke*, 43 Ch. D. 519. But I see no reason to suppose that such an action will lie where the grantee would have had no *cause of action* at common law; see *Murray* v. *Thornley*, 2 C. B. 217; *Whitaker* v. *Forbes*, L. R. 10 C. P. 583; *Companhia de Moçambique* v. *British South Africa Co.*, '92, 2 Q. B. 358; '93, A. C. 602. Seisin in deed of the rent was as necessary to support an action for the recovery of a rentcharge as in the case of a rent seek; Co. Litt. 160 a. If, however, the rent be granted by way of use executed by the statute, it appears that the grantee will at once acquire seisin in deed of the rent, without receipt of any part of it; *Heelis* v. *Blain*, 18 C.B., N.S. 90.
[7] See Maitland, Mystery of Seisin, L. Q. R. ii. 494, and authorities there cited.

exclusive privilege by peaceably and uninterruptedly making and selling copies of his work, if these acts are no more than an exercise of his common liberty of action? Or must he actually exercise his privilege, that is, enforce the restraint, which it imposes? But the restraint is enforceable by action only; and it seems impossible to maintain that a man cannot have possession of a copyright without bringing an action for its infringement. For the fact that infringement of copyright is a good cause of action would seem to show that the proprietor of the copyright is effectually seised of his right[1]. Curiously enough, however, the present law of copyright in books affords an exact parallel to the old law as to acquiring seisin of incorporeal hereditaments. Under Talfourd's Act[2], the privilege of copyright is secured to the author or his assigns on the first publication of a book; but no remedy is maintainable for the protection of the author's privilege until the proprietorship of the copyright be duly entered in the register. In this instance, therefore, it may surely be contended that the author of a book cannot be effectively in possession of his copyright until he is in a position to protect himself against infringement of his right[3]. And the overt act of dominion, which consists in duly registering the proprietorship, may be regarded as taking possession. But if, in order to gain possession of the copyright in a book, you must place yourself in the position to bring an action, does not that tend to show that copyright is of the nature of a thing lying in action?

I further contend that, although copyright may be susceptible of a kind of possession, and even though the proprietor of the copyright may be effectually armed with every remedy and so fairly seised of his right from its very inception[4], the proprietor of a copyright cannot on that account be said to have a *chose in possession*. For I submit that to have a *chose in possession*, as the term is used in English law, is to be the owner of a tangible thing[5]; and that,

[1] Want of right and want of remedy are in one equipage, as Lord Coke says, 6 Rep. 58 b, and the converse of this appears to be true.

[2] Stat. 5 & 6 Vict. c. 45, ss. 3, 11, 24.

[3] It seems to be a question whether the assignee of a copyright must register in order to entitle him to sue for infringement, if the original proprietorship were registered and the assignment were by writing only; see *Wood* v. *Boosey*, L. R. 2 Q. B. 340.

[4] This appears to be the case with persons entitled to the sole liberty of representing a dramatic piece; Stat. 3 & 4 Will. IV. c. 15; 5 & 6 Vict. c. 45, ss. 20, 24.

[5] See p. 224 above. When it said that marriage is an absolute gift to the husband of his wife's chattels personal in possession (Co. Litt. 351 b), that signifies that the ownership of the wife's tangible chattels vested in the husband absolutely. This appears from the fact that, where the wife had property in the extended sense of a mere right of ownership of tangible goods (see p. 227 above), such property was held, against the earlier rule, to vest in the husband; but no other mere right of the wife would vest absolutely in the husband; see Y. B. 20 Edw. I. 174; Fitz. Abr. Replevin, 43; Moore, 25, pl. 85; *Davis* v. *Marshall*, Sid. 172; 1 Keble, 641; Bac. Abr. Detinue (A.). Thus a personal annuity granted to the wife for life was

where mere rights were considered as capable of being possessed, though they may in some cases be regarded as things of a mixed nature, viz. partly in possession and partly in action, they are clearly distinguished in law from things in possession pure and simple [1]. Thus if such possession as the law conceived of were actually acquired of an incorporeal hereditament, that did not alter the nature of the thing. An advowson in gross remained a purely incorporeal hereditament lying in grant [2], notwithstanding that a grantee thereof might have acquired seisin of the thing by exercising the right of presentation. So a rent seck, although it was so far considered to be capable of manual occupation that a man might be said to be seised thereof *in his demesne* as of fee [3], remained a purely incorporeal hereditament lying in grant [4], notwithstanding that the grantee might have acquired actual seisin thereof by receipt of some part of the rent. Similarly in the case of a married woman subject to the common law, it appears that her husband may reduce her stock or shares into his possession by procuring their transfer into his own name [5]. But if he were to do so, they would not become things in possession. On the contrary, they would remain his things in action; and if he were to mortgage them without transferring them into the mortgagee's name, and afterwards be adjudged bankrupt, they would not pass to the trustee as having been in his reputed ownership. Again, the recovery of debt or damages by action is a kind of reduction into possession of a mere right, namely, the obligation to pay [6], but does not immediately result in the acquisition of a thing in possession. For the judgment, which ends the action, is a thing in action, because it may be sued upon; though it is not merely in action, because it may be satisfied, without action, by levying execution [7]. Still a judgment debt is a mere obligation to pay, which may be

held to survive to her, even though her husband had released it to the grantor; *Thompson* v. *Butler*, Moore, 522, pl. 689.

[1] Thus where a husband was seised of a rent seek in right of his wife, instalments of the rent, which became due during the coverture but remained unpaid, were said to be chattels real of a mixed nature, viz. partly in possession and partly in action; but they were not considered to be chattels (real or personal) in possession simply; see Co. Litt. 351. So a judgment debt would seem to be a thing of a mixed nature, but not a chose in possession; post, p. 236. It may be remarked that Lord Justice Fry's dictum (30 Ch. D. 285), that the law knows no *tertium quid* between personal things in possession and those in action, seems scarcely correct.

[2] Litt. s. 628.

[3] Litt. s. 10.

[4] See Litt. ss. 616–618; Co. Litt. 332 a.

[5] See *Wildman* v. *Wildman*, 9 Ves. 174, 177, 7 R. R 153; *Nicholson* v. *Drury Buildings Estate Co.*, 7 Ch. D. 48, 55; Roper, Husband and Wife, 221, second edition.

[6] Where a husband could and did sue alone upon his wife's cause of action, and he obtained judgment, but died before execution sued, the judgment debt did not survive to the wife, but passed to his representatives; 1 Roper, Husband and Wife, 212, 214, second edition. See also 2 Black. Comm. 436–438.

[7] Litt. s. 504; Co. Litt. 289 a; 3 Black. Comm. 160, 421.

discharged by bankruptcy; and the creditor, far from having a thing in possession[1], may be deprived even of the proceeds of execution by the debtor's bankruptcy before the execution is completed[2]. And if a woman entitled to a judgment debt married under the common law, the benefit of the debt did not vest in her husband upon marriage, though it became his upon an award of execution[3]. So that a judgment debt cannot be a simple chose in possession. I therefore submit that, although copyright may be a thing of which a man may acquire a kind of possession, that does not make it a *chose in possession*, as the term is used in English law[4].

Lastly, is it seriously contended that, in the case of a woman entitled to copyright, who married under the common law, the copyright vested absolutely in the husband upon marriage? Considering that the wife is entitled to a mere right of restriction on others' conduct enforceable by action only, I maintain that if the husband would prevent the copyright from remaining to his wife by survivorship, he must take such steps as are possible to acquire the sole dominion of it[5]. That is to say, he must procure himself to be registered as the proprietor, and so place himself in a position to exercise the sole control over the effective part of copyright, the right to sue for its infringement. Until he has done so, any infringement of the copyright must be a cause of action by the wife, and, like any other tort against the wife, must be sued on, at common law, by the husband and wife jointly. And so long as this remains the case, the husband surely cannot be said to be

[1] Upon execution against the debtor's goods under a writ of *fi. fa.*, the debtor remains the owner of the goods until they are sold by the sheriff; *Payne* v. *Drewe*, 4 East, 523; *Thurston* v. *Mills*, 16 East, 254, 274; *R.* v. *Wells and Allnutt*, 16 East, 278, n., 14 R. R. 347.

[2] This has been the case from the earliest times of the bankruptcy law; see Stat. 21 Jac. I. c. 21, s. 9; *Philips* v. *Thompson*, 3 Lev. 69, 191. By this statute a judgment creditor was deprived of the charge, which the judgment gave him, on the debtor's lands, if he had not completely taken the lands in execution before the debtor's bankruptcy; *Newland* v. *Anon.*, 1 P. W. 92; *Orlebar* v. *Fletcher*, ibid. 738, 739; *Sharpe* v. *Roahde*, 2 Rose, 192. But the charge on a judgment debtor's lands given by Stat. 1 & 2 Viet. c. 110, s. 13, was not defeated, if entered up one year before the debtor's bankruptcy; *Exparte Boyle*, 3 De G. M. & G. 515. The abolition of the lien of judgments on lands by Stat. 27 & 28 Viet. c. 112, restored the old law in the case of bankruptcy. The present law is contained in Stat. 46 & 47 Viet. c. 52, s. 45; see *Figg* v. *Moore*, '94, 2 Q. B. 690; Trustee of *Burns* v. *Brown*, '95, 1 Q. B. 324.

[3] *Woodyer* v. *Gresham*, 1 Salk. 116.

[4] It is only just to Mr. Brodhurst to note here that his contention is that copyrights should be classed as things in constructive possession. But I confine my argument to the question, what place should copyright occupy in the classification authoritatively applied to chattels personal? And I cannot find that the law recognizes things in constructive possession as a distinct class of things. Tangible goods, of which the owner may resume possession at will, seem to be subject to the same law as things in possession pure and simple; see note 5 to p. 234 above; L. Q. R. x. 153, 154.

[5] See note 5 to p. 234 above.

possessed of the copyright, or to have any thing in possession. Upon these considerations I submit that, if the classification of chattels personal as being in possession or action must be applied to copyright, it ought to be ranged with things in action rather than things in possession.

T. Cyprian Williams.

CHOSES IN ACTION.

MR. BRODHURST'S argument[1], if I rightly understand it, is that 'chose in action' properly means some corporeal thing which a person has the right to recover by legal proceedings, not property, such as copyright, which is in its nature incapable of physical possession. Or, to put the argument still more shortly, copyright is from its inception as much in possession as it ever can be, and therefore it is a chose in possession and not a chose in action. Mr. Brodhurst also makes some interesting remarks on the nature of possession in the case of copyright, and on the problem whether 'chose in action' means the property to be recovered or the right to recover it. These questions are no doubt fit matters for discussion in an institutional work, where a proper classification is essential to guide the student; in such a work it is necessary to point out the distinction between choses in action in the original sense of the term, which are essentially transitory rights *in personam*, and such forms of property as patents and copyrights, which are essentially permanent rights *in rem*. But these are not the questions which I understand Sir Howard Elphinstone to have raised in the pages of this REVIEW: what he and Mr. Cyprian Williams and I have discussed is the practical question whether certain rights or forms of property are or are not choses in action.

To make my meaning clearer I will put some cases. A woman, being entitled to a copyright, marries before 1870, and makes no settlement: her husband dies, having done nothing with reference to the copyright, and having by his will left all his personal property to *X*. Who is entitled to the copyright? According to Mr. Brodhurst, it is and always was a chose in possession, and therefore belongs to *X*. I maintain that it is a chose in action, and that, not having been reduced into possession by the husband, it belongs to his widow. Or suppose that *A*, a publisher, is entitled to the copyright in a book which he publishes and that he is the registered proprietor: he assigns the copyright to *B* as security for a loan, but remains registered as proprietor: *A* becomes bankrupt. Who is entitled to the copyright? According to Mr. Brodhurst it passes to the trustee in bankruptcy. I maintain that being a chose in action, it is excluded from the reputed ownership clause, and

[1] 'Is Copyright a Chose in Action?' L. Q. R. xi. 64.

that *B* is entitled to enforce his security. Again, if the owner of a copyright assigns it as security for a loan, must he observe the requirements of the Bills of Sale Acts? According to Mr. Brodhurst he must: according to the practice of conveyancers he need not.

I confess I cannot follow Mr. Brodhurst when he says that a share in a company is analogous to a debt. I think Mr. Brodhurst is unconsciously influenced by the fact that the interest or right of property represented by a share is usually stated in pounds sterling, and that the original shareholder probably paid that amount for the share, for Mr. Brodhurst speaks of the possibility of the shareholder 'recovering' his capital by legal proceedings against the company. But the creation of a share capital (apart from the question of finance) is merely a convenient way of fixing the extent to which each shareholder is entitled to participate in the management, profits, and assets of the company. Where a company is limited by guarantee without a share capital, and consists of 500 members having equal interests, each member has a share or interest in the management, profits and assets of the company to the extent of one 500th; the result is practically the same as if the company had a share capital of £50,000, and each member held paid-up shares to the amount of £100, but no one would, I think, contend that the interest of a member of the former company bears any resemblance, in form or in substance, to a debt due to him by a private person. Again, Mr. Brodhurst says that in certain cases a shareholder in a company 'has a right to occupy the pecuniary equivalent of his share upon the non-fulfilment by the company of the promises which induced him to part with his money.' No doubt he has, but the right which a person has to rescind a contract to take shares on the ground of misrepresentation arises from the misrepresentation, not from the fact of membership. For example, if the shareholder transferred his shares to another person, the latter would have no right of action against the company. It is true that in the case of an ordinary company, where no question of misrepresentation arises, the rights of the members may have to be ascertained and adjusted by legal proceedings, but this fact does not, I submit, alter the nature of those rights. No member has an absolute right to take legal proceedings to have his share in the company's assets ascertained and paid over to him, for if a majority of the members agree to continue the business, or to go into voluntary liquidation, a dissentient member cannot prevent them, unless the court sees fit to interfere, which it will not do except in a strong case[1]. The right to take legal proceedings is an incident,

[1] See the cases collected in Lindley on Company Law, 649 seq. (5th edit.).

not an essential part of the shareholder's interest in the company If the joint tenants of land or the co-owners of a ship cannot agree as to its disposition they may have their rights adjusted by the court[1], but this does not make the interest of each joint tenant or co-owner a chose in action.

The difficulty in ascertaining what is and what is not a chose in action arises partly from historical causes, and partly from the ignorance of the ordinary parliamentary draftsman. It was a simple matter for the old lawyers to say that marriage was an absolute gift to the husband of all chattels personal in possession belonging to the wife in her own right, but that if they were in action, as debts by obligation, contract, or otherwise, the husband should not have them unless he and his wife recovered them[2]. The difficulty arises when we come to apply this doctrine to new kinds of property which were not thought of when the old rule was formulated. As Sir W. Grant said in reference to the question whether stock belonging to a married woman remained her property if it was not reduced into possession by the husband: 'This is a species of property grown up since all these distinctions were settled in our law[3].' In cases like this the lawyer has to do his best with the materials at hand. With regard to modern statutes the case is different, for many if not all of these difficulties could be avoided if a little skill and care were exercised by the draftsman. It is instructive to observe the difference between such statutes as the Bankruptcy and Bills of Sale Acts and an act drawn by a man who understands his business. The draftsman of the Bankruptcy Act, 1869 probably never heard that any question had arisen as to stocks, shares, copyrights and patents being choses in action, and the question was obviously not present to the mind of the draftsman of the Judicature Act, 1873. The draftsman of the Conveyancing Act, 1881, on the other hand, knew that the plan devised by him for transferring property to new trustees by vesting declaration would not work in the case of stocks, shares and patents, and he therefore excluded them from the operation of sec. 34 of the Act.

CHARLES SWEET

[1] As to ships, see Williams, Pers. Prop. 117 (14th edit.).
[2] Co. Litt. 351 b.
[3] *Wildman* v. *Wildman*, 9 Ves. at p. 176.

PROOF OF FOREIGN LAW.

IN 1861 an Act (24 & 25 Vict. c. 11) was passed purporting to provide a means for the better ascertainment of the law of foreign countries. The gist of the Act is that any superior British court may remit a case, together with the questions of law arising out of the same, for the opinion of a superior court in any foreign country with which Her Majesty shall have entered into a convention for the purpose, on the law administered by it as applicable to such case. The requisitioning court shall, however, not be bound by such opinion and may return the case for further opinion or similarly consult any other such superior court.

In 1865 (Hansard, vol. 180, 3rd series, July 3) a question was asked in the House of Commons whether any convention under the above Act had been entered into, and the answer given by Mr. Layard was, that 'the subject was of considerable importance and that Her Majesty's Government had been in communication with most of the foreign Governments with reference to it; that the papers had been laid before the Lord Chancellor, but that no convention had yet been entered into.'

Since then nothing more has been done in the matter, so far as I have been able to trace, and the Act seems to be a dead letter (cf. Chitty's Statutes, 5th ed. vol. iv. p. 32). This is to be regretted. The subject has certainly not lost in importance, but on the contrary is becoming more important from day to day in direct proportion to the increase of commerce and the growing intimacy in the intercourse of nations.

At present the principal mode open to the parties of proving the law of a foreign country, nay, the only one (if we omit a few exceptional cases in which perhaps the certificate of a Consul-General or a diplomatic representative might be received in evidence), is to bring advocates practising in such country as witnesses before the court or a commission. This method will work well enough in simple cases where only one party adduces such evidence and the other party does not dispute, or attempt to disprove it. When, however, put to the test in complex cases in which fine points of law are involved and where two or more advocates are enlisted against each other and depose to opposite statements and views, its inadequacy becomes at once apparent, and it cannot fail in many

instances to prove a source of great embarrassment to the judge who has to determine between the two adversaries.

Parties requiring to prove or contest a point of foreign law will have no difficulty in finding advocates ready to embrace their respective cases and to fight them[1], as it were, without dishonesty, in the same way as the assistance of solicitors and counsel can be procured for almost any case without any suspicion of mala fides attaching to them. Such advocates will have no reason to fight shy of a cross-examination which, to a lawyer who is at all worth his salt, can have no terror—especially when conducted by a counsel who not being versed in the foreign system of law and its intricacies, will always be at a considerable disadvantage[2]. Now, in order to decide between such conflicting views and to determine which of the experts has construed the law rightly, no other means can be conceived, except where apparent gross logical errors have been committed, than a direct reference to that law itself. But such reference in order to conduce to satisfactory results will have to be made on the principle of *similia similibus*, and will, as to its mode, have to be congruous to the subject-matter. In other words, in comprehending and construing foreign law it will not be enough to acquire a knowledge of its rules, but the English judge will also have to divest himself of his own peculiar method of judicial thinking and reasoning and adopt the method of foreign jurists and courts in applying such rules to a given set of circumstances. This, I submit, is the only correct standard to be employed if you want to decide between two opposite statements of the foreign law, and if you really and genuinely wish to apply it. Now, are the English courts in possession of this standard? I will quote a few dicta from the books which would seem to make it at least doubtful whether that question can be answered in the affirmative.

In *Nelson* v. *Bridgport* (8 Beav. pp. 527, 529) Lord Langdale observes, 'With foreign law an English judge cannot be familiar . . . there is, in every case of foreign law, an absence of all the accumulated knowledge and ready associations which assist him in

[1] Wharton (Conflict of Laws, 1872, § 774) says: 'The English practice is to call as a witness a jurist. It may be objected to this usage that experts of this character when selected by the parties are often so selected either from their prejudice or from their pliability, and that the result often is that so many such experts will be found to testify on one side of a case, and with equal positiveness as has been testified on the other.' Of the inconclusiveness of such opinion an illustration may be found in a case before the English Divorce Court, '1866, *Hyde* v. *Hyde*, 1 P. & D. 133.' Lord Campbell (*Sussex Peerage* case, 1844, 11 Cl. & F., p. 115), speaking of such an expert, observes: 'a witness whose memory may be defective, and who may have a bias influencing his mind upon the law.'

[2] Even an apparent breakdown of such an expert might be due to his want of knowledge of the English language and technical legal terms, the incompetency of the interpreter and other causes, not necessarily to the badness of the cause of his party.

the consideration of that which is the English law and of the manner in which it ought to be applied in a given state of circumstances to which it is applicable.' 'The judge is constantly liable to be misled by the erroneous suggestion of analogies which arise in his own mind and are pressed upon him on all sides. These difficulties are obvious enough even in cases in which he may have before him the very words of what is proved to have been the law applicable to the events in question.' 'Whoever has considered the difficulties which frequently arise in our own courts in the investigation of English law applicable to particular cases and the mode of reasoning and investigating by which it is endeavoured to surmount those difficulties will perceive what presumption it would often, nay, generally be, in an English judge to attempt to apply the same process to the investigation of a foreign law and the consideration of its proper application to particular cases.'

'Although I think that when it (the foreign law or commentary) is produced the judge has in general no right to take upon himself the business of construing it and determining its application, yet when the passages are produced they may enable the party affected by the testimony not only to cross-examine the witness as to his own interpretation or inferences and the grounds thereof, but also to call other witnesses to the same point[1].'

In *Baron de Bode's* case (1844, 8 Q. B. p. 265) Coleridge J. says: 'When the language (of the written law) is before us we have no means by which to construe it... for after all, if we were to attempt extrajudicially to expound that law we should be liable to the most serious errors. The question for us is not what the language of the written law is, but what the law is altogether as shown by exposition, interpretation, or adjudication. How many errors might result if a foreign court attempted to collect the law from the language of some of our statutes which declare instruments in particular cases to be "null and void to all intents and purposes," still an English lawyer would state that they were good against the grantor and that the courts have so expounded the Statute.'

In the *Sussex Peerage* case (11 Cl. & F. 114–117) Lord Brougham observes: 'but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House (of Lords) the book of the law, for the House has no organs to know and to deal with the text of that law.'

In *Di Sora* v. *Phillipps* (10 H. L. C. 640) Lord Chelmsford says: 'It seems, however, rather questionable whether the judge has a right

[1] From this passage it would appear that in Lord Langdale's opinion books should only be produced for the benefit of the opposite party, not for examination by the judge.

to resort to the foreign law itself for information when the evidence of the witness is not satisfactory to his mind.'

Yet in spite of all these emphatic utterances tending in exactly the same direction, viz. that it is outside the province of an English judge to construe and examine into the authorities of foreign law, it seems to be settled beyond dispute that he may do so, and as a matter of fact it is constantly practised, provided only that experts have in their evidence referred to such authorities.

This practice, with the qualification mentioned, appears to have been originated by Lord Stowell[1] and was referred to by Lord Langdale, who in *Nelson* v. *Bridgport* observes: 'In *Lindo* v. *Belisario* (1795, Hagg. Cons. 216) in which the evidence taken upon the interrogatory was not clear and positive, he (Lord Stowell) thought that he should not transgress his duty if he looked beyond the evidence, but not farther than the evidence fairly led. And in both the cases of *Lindo* v. *Belisario* and *Dalrymple* v. *Dalrymple*, I understand him not to have considered any authority, opinion, or passage, not distinctly referred to by the witnesses, and so not to have looked farther than he considered the evidence to have fairly led and yet to have gone beyond the evidence in considering for himself the effect of the authority referred to with the view of acquiring for himself notions by which he might be better able to decide upon the effect of the varying or obscure testimony of the witnesses[2].'

Now, what does this practice placed side by side with the above

[1] Lord Brougham in his sketch of Lord Stowell (Statesmen of the time of Geo. III, 2nd ser. 76) writes: 'It is possibly hypercritical to remark one inaccurate view which pervades a portion of his (Lord Stowell's) judgment (*Dalrymple* v. *Dalrymple*). Although the Scottish law was of course only matter of evidence before Sir W. Scott ... he yet allowed himself to examine the writings of commentators, and to deal with them as if he were a Scottish lawyer.... He (the judge) had no means of approaching such things, nor could avoid falling into errors when he endeavoured to understand their meaning, and still more when he attempted to weigh them and to compare them together. This at least is the strict view of the matter, and in many cases the fact would bear it out. Thus we constantly see gross errors committed by Scottish and French lawyers of eminence when they think they can apply an English authority.' [No modern lawyer will hesitate to prefer Lord Stowell's authority to Lord Brougham's.—Ed.]

[2] Lord Langdale in the same judgment observes: 'A judge endowed as Lord Stowell was might perhaps safely do some things which other judges might find it very hazardous to imitate.' This seems to militate against the notion that Lord Langdale looked upon Lord Stowell's practice as an established rule, since with regard to such rule no distinction could properly be drawn between strong and less strong judges.

Another observation of Lord Langdale in the same judgment is the following: 'Though knowledge of foreign law is not to be imputed to a judge, you may impute to him such a knowledge of the general art of reasoning as will enable him with the assistance of the bar to discover where fallacies are probably concealed....' To this I may be allowed to say that the law of a country being not merely a creature of logic, the reasoning alone of even the most able logician will not always avail him to arrive at results conformable with such positive law. I refer in this respect to a remark of the Master of the Rolls in *Nelson* v. *Bridgport* (p. 540): 'In matters of foreign law, particularly when complicated, where every party engaged in the inquiry is a mere disciple, where no adept is present,' &c.

dicta signify? It signifies that English courts, though debarred through professed incompetency from looking at foreign law books referred to by the parties—even for the purpose of deciding a simple question of foreign law—are, on the other hand, quite at liberty and competent, even on intricate questions, to examine into foreign legal authorities where the latter are referred to by witnesses in order to decide whether or not the witnesses' conclusions were right. Thus, by this ingenious process, English courts have arrived at this result that they virtually do construe the foreign law[1] and that they practise with a certain though apparently purely technical qualification that which in theory they most emphatically repudiate. It goes without saying that this mode of proceeding is not due to wantonness or exaggerated self-confidence on the part of English judges. Its justification lies in its necessity.

Lord Langdale, in *Nelson* v. *Bridgport*, says: 'In this as in many other instances there is room for the exercise of a sound and cautious discretion, by the employment of which courts are enabled to bring some cases, otherwise interminable, to a good and even satisfactory

[1] A very instructive illustration presents itself in a recent case, *Concha* v. *Murietta* (1889, 40 Ch. D. 543), in which Peruvian law was to be applied. According to the law of Peru a father is entitled to administer the estate of his infant child, and to receive for his own benefit the income during the child's minority. A father during the infancy of his daughter sold a part of her property consisting of certain bonds, by which sale a considerable loss was incurred in respect of the daughter's property. After his death the daughter claimed compensation out of his estate for the loss occasioned by this disadvantageous sale. The evidence relied on as to Peruvian law consisted of two affidavits, one by *Zevallos*, and the other by *Perla*. The former deposing to the effect that as administrator the father was authorized to sell, as long as he did so bona fide, and in the exercise of his best discretion, abilities and judgment; whilst Perla, on the other hand, deposed that the code of Peru placing a father administering his children's property on exactly the same footing as an usufructuary withheld from him the power of sale. Stirling J. attached greater weight to the affidavit of Zevallos than to that of Perla, and decided in favour of the father's estate. The question whether the court could look at the provisions of the code for itself was not raised by him.

The Court of Appeal, reviewing the passages of the code of Peru referred to, arrived at the opposite conclusion, and reversed the decision of Stirling J. The judgment turned mainly on this syllogism: Parents who administer the property of their children are subject to the same obligations as the usufructuary (Art. 295). The usufructuary cannot alienate the thing subject to the usufruct (Art. 1095). *Ergo*: the father had no right to alienate the shares. I do not feel in any way competent, nor do I wish to comment on the merits of this decision, but I think that anybody reading the report must be struck at the extreme scantiness of the materials supplied from the law of Peru. There is not a word said about any authoritative exposition, interpretation of, or adjudication on that law. And surely an authoritative voice was needed to explain that most extraordinary and rigorous proposition (if at all applicable to the case) that a father, being usufructuary and administrator, should in the latter capacity have no right, under any circumstances, as it would appear from the clause, to sell a single share belonging to the administered property. Cotton L.J. supplemented this apparent gross deficiency by saying, 'a bona fide sale for the purpose of reinvestment might well come within the power of the administrator'; but this he did from the storehouse of *English Law*; the Peruvian law, as supplied, was silent on the point. (Perla had made a passing remark as to the consent of the court being required, but did not refer to any authority or passage of the code.)

conclusion. . . . If the utmost strictness were required in every case justice might often have to stand still.'

Lord Denman, in the *Sussex Peerage* case, says: 'You may have to open the question on the knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you may decide as well as you can on the conflicting testimony.'

The judge, being under the obligation to determine the cases before him, has to make shift and decide in accordance with the materials and means at his disposal.

It is for legislation to supply him with such materials and means as will afford a guarantee of such law being really applied as was intended to be applied instead of a spurious article manufactured in an unsystematic and therefore haphazard way on the stratum of inadequate and adulterated materials, and leading to decisions which might tend to derogate from the high esteem in which English judges are held all over the world; for such decisions are sure to be commented upon in those countries to whose sphere of law the merits of the case properly belong.

It may perhaps be objected that there is no reason why foreign law being a fact in the case should be dealt with differently from other facts, and that any other treatment would fall outside the frame of our legal system.

The answer to such an objection would be, that foreign law does indeed occupy a peculiar position distinct from any other element incidental to the determination of a law-suit. In the first place it is hardly correct to say that it is a fact. Williams J., in *Baron de Bode's* case (8 Q. B. p. 260), says: 'We hear *in limine* that foreign law is to be proved as a fact. What does that mean? Is it a fact in the ordinary acceptation of the word as it is a fact that a man was seen walking in a field or riding away with a horse? It clearly means as applicable to this subject, the result which has been produced on the mind of a scientific person by his reading and intelligence in respect of the particular subject. There is thus little analogy to the proof of the facts ordinarily so called. . . . Thus it is conceded that a fact of this sort is to be proved by evidence altogether inapplicable to facts in the ordinary sense of the word.' Coleridge J. (p. 263, ibid.), 'We acquire a knowledge of written law in general as a fact, but a fact, as my brother Williams has stated, of a peculiar kind, a fact which can be arrived at only as a matter of science and not as a matter of mere practice[1].'

From a merely logical point it would be a misnomer to call

[1] In the same case the joint evidence of two experts on law was received contrary to the ordinary rules of evidence.

foreign law a fact and at the same time speak of applying it. You cannot say, you apply a fact to a fact—it is and remains law, whatever part may have been attributed to it by an artificial doctrine.

Another reason which distinguishes and elevates it above the sphere of the ordinary facts of a case is this, that where the judge holds that it should be applied, there it governs the case, ousts the English law, and assumes the latter's position and dignity.

There is a last circumstance which I think should not be overlooked in connexion with this point, namely that the proof of foreign law under the present mode of procedure has this practical peculiarity, that from the nature of it, the witnesses called upon in respect of it are almost invariably foreigners resident and practising in more or less remote countries. An inevitable consequence of this is that, apart from the difficulty and expenses in procuring their personal appearance, neither the courts nor the parties affected by their evidence know anything about their standing, their professional position and reputation, so that this important though extrinsic criterion for weighing and criticizing the value of their evidence, which assists so considerably with regard to other experts, will be missing in these cases. One advocate will be like the other, whatever real difference as to their experience and qualifications in general or in respect of the particular branch of the law in question there may be between them. This observation applies to the courts of first instance and still more to the Courts of Appeal. Lord Wensleydale, in *Bremer* v. *Freeman* (10 Moo. P. C. p. 361), says: 'It is to be lamented that, from the very nature of the case, we cannot satisfy ourselves by the personal examination of those witnesses as to the weight due to each of them, and a proper sense of professional delicacy precludes them from giving evidence as to the merits of each other. We are compelled, therefore, to decide the disputed questions with inadequate means of judging of their professional eminence, their skill and knowledge.'

In conclusion, I may say that the general terms of the Act (24 & 25 Vict. c. 11) seem to give wide scope for the drafting of conventions as well as for the discretion of English judges in availing themselves of it: so that even the evidence of experts could, as heretofore, be taken in our own courts, and might only in the event of its being unsatisfactory or conflicting be remitted to the foreign court for determination. The foreign court could then give an opinion without hearing advocates on both sides, whereby a multiplication of trials would be avoided.

JULIUS HIRSCHFELD.

THE FRANCO-NEWFOUNDLAND CONTROVERSY.

THE latest treaty on this question was concluded shortly after Waterloo[1]. It confirms an arrangement made the year before at Paris, which reads as follows[2]:—

'Art. 13. As to the French right of fishery on the grand bank of Newfoundland, on the coasts of the isle of that name and the adjacent isles, and in the Gulph of St. Lawrence, everything shall be restored to the same footing as in 1792.'

The year 1792, or, according to the eighth Article, 'the first of January, 1792,' was not chosen with special reference to these fisheries. It echoes throughout the treaty and is applied to Europe, Asia, the West Indies as well as Newfoundland. The object of the allies was to annex the dawn of peace to the year before the war, to skip the Revolutionary as well as the Napoleonic era and restore the former status.

We have to do with the second of the treaty fisheries, that which may be exercised on the coasts of Newfoundland. Its territorial limits are not disputed. Under the arrangement of 1713, they stretched north-westwardly from Cape Bonavista, passed round the northern peninsula, and descended the west coast to Point Riche at the entrance of Ingornachoix Bay. A change was made in 1783 for reasons that shall be noticed. Beginning now at Cape Ray, the south-west corner of the island, they run northwards along the west shore and pass through the Straits of Belle Isle to Cape Norman; thence they skirt the northern peninsula in a southerly direction to White Bay, turn to the east and reach Cape St. John. This strip of coast and coastal waters, known as the French or Treaty Shore, measures 425 miles as the crow flies and 790 miles if you follow low-water mark. It is as if the south and east of England, from Spithead to Hull, were affected with foreign claims.

Our first and principal question is to whom does the district belong? The Treaty of Utrecht deals with the subject affirmatively and negatively in Article 13. By way of affirmation we read in the official Latin[3]: 'Insula, Terra Nova dicta, una cum Insulis adjacentibus, Iuris Britannici ex nunc in posterum omnino erit'; in French[4]: '. . . appartiendra désormais et absolutement à la

[1] Paris, Nov. 20, 1815, Art. 11. [2] Paris, May 30, 1814; Ann. Reg. 1814, p. 408.
[3] Tract. Pac. (Gt. B. & I., London, 1713. [4] Trait. de Paix (Fr., Paris, 1713.

Grande Bretagne'; and in English: 'shall henceforth belong of right wholly to Great Britain.' The renunciation or disclaimer is no less definite: 'Neque aliquid Iuris ad dictam Insulam et Insulas, ullamve illius aut earundem partem, Rex Christianissimus, Haeredes eius et successores aut Subditi aliqui, ullo dehinc tempore in posterum sibi vindicabunt'; in French: 'sans que ledit Roy T. C. . . . puissent désormais prétendre quoyque ce soit et en quelques tems que ce soit sur ladite Isle et les Isles adjacentes en tout ou en partie'; and in English: 'nor shall the M. C. King . . . at any time hereafter lay claim to any right to the said Island or Islands or to any part of it or them.' The Treaty of Paris[1] renews and confirms these provisions simply. In 1783[2], 'Sa Majesté, le Roi de la Grande Bretagne, est maintenue dans la propriété de l'isle de Terre Neuve . . . ainsi que le tout lui a été assuré par l'article treize du traité d'Utrecht'; or, as rendered in the translation attributed to Jenkinson and become official: 'is maintained in his right to the Island of Newfoundland . . . as the whole was assured to him by the thirteenth Article of the Treaty of Utrecht[3].'

These are the contents of the treaties which were in force in 1792, in so far as concerns the ownership of the island. I know not what stronger language could be used for its assertion or acknowledgment. If it does not confer on England absolute property as against the world, it surely carries, as against a signatory to the treaties, her sovereignty in the soil and coastal waters of Newfoundland, her jurisdiction over all persons who may come within the bounds, foreigners as well as subjects, and her sole power to say what laws shall obtain there and to execute them. It should likewise follow that such claims as France may have, no matter in what part of the island, spring from England's superior right and should be construed subject to it. Modern international law would warrant us in going further and calling for the strictest proof of the existence and extent of such claims, because, in the language of Phillimore, they are 'a special and extraordinary right,' and so far as they go impair the local sovereignty. The integrity of their soil, whether at home, in their colonies or in their protectorates, is a first principle with our friends across the Channel, but somehow they do not take this short view of the status of 1792 in regard to Newfoundland. On the one hand, they demand the execution of the treaties, 'dans toute leur étendue et dans toute leur rigueur,' as is their due, though the mode of its expression is rather brusque; and, on the other, introduce considerations which lie outside the

[1] Arts. 5 and 6.
[2] Treaty, Versailles, Art. 4, Martens, Rec. de Trait., t. ii. p. 465.
[3] Coll. of Treat., vol. iii. p. 357.

treaties to mark the extent they intend and to indicate the required degree of rigour [1].

Since the days of Chateaubriand [2], Kingdom, Empire and Republic have maintained that the Treaty of Utrecht is really a treaty of partition, and that its true operation is that France, once the lawful owner, ceded the island to England, and in the deed of gift reserved a fishery in 'Le Petit Nord [3],' which I take to be identical with the Treaty Shore, or a district in its vicinity, as distinguished from the port called Petit Nord. A reservation of this kind would be exclusive of English sovereignty and independent of any enumeration of rights or privileges conferred by the Treaty of Utrecht or any other instrument.

Partition treaties were no rarity in the eighteenth century. In 1698 and 1700, Louis XIV had drawn up the documents which are known to history as 'The Partition Treaties.' A few years before he concluded an arrangement with James II respecting Newfoundland, which involved separate holdings and several fisheries [4]. By virtue of its fifth Article he held or continued to hold Placentia, Saint Mary's and their surroundings, if not 'Le Petit Nord.' Article 6 directs that neither power 'shall trade, fish, . . . within the precincts of the other,' and that 'if any ship be found so doing' it shall be confiscated. Now, had a partition been intended in 1713, or the reservation of a fishery on an assigned coast, is it not probable that the language of Utrecht would bear traces of it and, at the least, be as explicit as that of London? So far as I can find there is no agreement for partition, there is no assent to reservation in any of the papers of 1713. The situation is this. *A* and *B* are in contest over certain properties. They agree that Blackacre shall henceforth belong to *A* absolutely. Does this denote partition of Blackacre? Let Petit Nord be some part of its northern extremity. Does *B* reserve an exclusive right there when he abandons claim to Blackacre, abandons every pretence of claim upon it and its every part, for all time, on his own account and on behalf of those who can claim through him?

The main argument of Chateaubriand is historical and permits of several admissions. The kings of France added to the style of Canadian governors the title of Governor of Newfoundland. But Louis XIV lavished more than honours when he chose. In 1664 he gave to the Occidental Company all the West Indian Islands with what of South America lies between the Amazon and the Orinoco, and threw in 'the North American Continent from the

[1] Yellow Bk. (Paris) 1890–1, see Desp. June 21, 1886; Dec. 7, 1888; June 22, 1889.
[2] St. Pap. For. Rel. U. S., vol. v. p. 580 et seq.
[3] Parl. Hist., vol. vii., App. No. 22. [4] London, 1686.

north of Canada to Virginia and Florida, together with the whole coast of Africa from Cape de Verde to the Cape of Good Hope[1].' Does this confer a valid claim or enure to national ownership more than the customary rodomontade of our own early Charters? French sailors, no doubt, fished on the banks of Newfoundland, on many parts of its coast, and, if Abbé Raynal[2] may be trusted, in that vague region called 'Le Petit Nord,' from the refounding of Canada, if not earlier; but what of that? Spaniards, Portuguese and Dutch, according to the same authority, pursued the same industry in the same places for a longer term of years. French, English and Americans have whaled, sealed and fished on numberless coasts to which their governments never preferred claim. If you inquire as to possession and settlement, you will find, as Garneau[3] says, that notwithstanding their fisheries, the French paid little attention to Newfoundland till 1660, when the Court of Versailles made its first cession or issued its first charter. Abbé Raynal thinks the issue of any charter was a mistake and the particular grantee ill chosen; but, be that as it may, the point for us is that the bounds of the cession did not reach beyond the Bay of Placentia, which became the French headquarters for fishing in North America. But Placentia Bay is at the south of Newfoundland and by the shortest way lies 300 miles from the disputed shore. Its settlement may be valid for many purposes, but does it prove a prior occupation of the island? At the date of the Star Chamber Regulations (1633) there was a substantive English population in Newfoundland. Whitbourne tells us in his Discourse (1621) how he empanelled juries, and in 170 cases dealt out a rough sort of justice to the inhabitants of St. John's, Harbour Grace, Carbonear, Ferryland, Trinity, Fermouse (Formosa), under commission from King James I. I do not find a detailed account of trade and population for 1660, but, according to the report of Capt. Robinson[4], the then governor, there were forty-eight English settlements between Cape Race and Cape Bonavista in 1661. A few years later (1675) Sir John Berry informs the Government that the 'home' ships engaged in the fishery numbered 175, with 688 boats, carrying 4,309 men, and having a total catch valued at £116,272, and compares it with the local industry—which had 277 boats with 1655 'residents,' and a total catch worth £46,813, 'upwards of one-third of the fish taken by the Merchant Adventurers[5].' These settlements stood between Placentia and the reputed Petit Nord. In the absence of charter, cession or continued occupation, the district would fall to

[1] E. Lareau, Hist. du Droit Can., t. i. p. 494.
[2] Hist. Phil. t. viii. p. 196.
[3] Hist. du Can., t. i. 360.
[4] Calen. St. Pap. (Col.), 1661-8, No. 1729.
[5] Ibid., 1675-6, No. 665.

the English rather than to the French. In regard to Petit Nord, no charter, no cession is adduced and no continued occupation is shown.

Conquest is invoked to support the reservation theory. Here we may fairly take the representation of Garneau [1], who cannot be accused of prejudice against France and is not wont to minimize her exploits. He says that in the winters of 1696–7, 1703–4, 1709–10, organized expeditions, composed of French settlers, Canadians and Indians, set out from Placentia to subdue the island; that on each occasion they overran the greater part of it, including St. John's and Ferryland, but were as often repulsed from Carbonear and Bonavista; and that on approach of the English fishing fleet in the early spring of each year, they abandoned both booty and prisoners, and took refuge behind the fortifications of Placentia. These were raids, not conquests. He adds significantly that 'if France had been mistress of the seas the whole island would have passed under her domination.' Captain Mahon has made it very plain that command of the sea determined the empire of the West. From 1710 till the drawing up of the treaty there was neither raid nor attack, so that 'the attempt and not the deed confounds' the argument from conquest.

The form of Article 13 is supposed to countenance the French claim, because it does not negative a prior occupation by France directly. But the argument, it seems to me, may be applied with greater force on the other side. If France had had prior occupation, should we not have found in the treaty sufficient words of conveyance applied to the whole island, as give, yield, surrender, grant or cede? Thus, in 1763 France cedes Canada to England, and England cedes to France the islands of Saint Pierre and Miquelon [2]. The fact that she does not cede the island is good reason for saying that France was not the owner of it. But she does cede a part of it, that portion, namely, which she held or claimed. The arrangement of Article 13 is as follows: (1) Newfoundland shall belong to England absolutely; (2) 'to this end the town and fortress of Placentia and whatever other places in the said island are in the possession of the French ('la ville et le fort de Plaisance et autres lieux que les Français pourroient encore posséder dans ladite Isle') shall be yielded and given up within seven months' ('cedentur et tradentur,' 'fera remettre'); (3) the abnegation clause given above; and (4) certain prohibitions and permissions to be examined further on.

It would appear that the French possessions were a disturbing element in Newfoundland, and figured largely in her history; it

[1] Hist. du Can., t. ii. p. 35 et seq.

[2] Treaty of Paris, Arts. 4, 6.

would appear, likewise, that they covered no portion of 'Le Petit Nord.' In return for the release of certain Huguenots from the galleys, Queen Anne allowed the French fishermen to sell their establishments on the island, and the sales took place accordingly. The purchasers held their bargains as private property; in other words, refused to throw them into the common stock or lay them open for the first comer in spring as by law and custom was required. Thereupon arose a long-continued and bitter conflict, that occupies many pages of Reeves' History [1], between the 'free-fishery' men, who invoked the statute 10 & 11 Will. III. c. 25, and the 'monopolists,' 'disturbers,' 'interlopers,' who could vouch only the Order in Council but were supported by the admiral on the station. The Lords of Trade and Plantations found themselves besieged by both parties; their counsel pronounced the sales void and the Order illegal; and the feud was assuaged at length by severing those districts wherein the sales took place from the Newfoundland administration and annexing them to Nova Scotia. Again, by the Quebec Act (1774), Labrador, which had become British under the Treaty of Paris and been given to Newfoundland, was transferred to Canada because private rights in land had accrued there also under capitulatory sales. Had the French had any establishments worth selling in any portion of 'Le Petit Nord,' we may fairly assume that they would have been sold, that private rights would have accrued, that 10 & 11 Will. III would have encountered the same resistance there as in Placentia Bay and the Labrador, and that a like transference would have taken place. But at no time was the Treaty Shore of 1713, or the Treaty Shore of 1783, or any portion of either of them, severed from the Newfoundland Government. To those who argue that it is open to France to rely on simple discovery, mere landing, raising of marks, temporary occupation as warrants of title, it is sufficient to answer (1) that she began her explorations long after the discovery of the island by Cabot, and (2) that to gain access to the New World she formulated under Francis I a rule that is now generally accepted as international law, and is well expressed by Royneval [2] in these words: 'il faut, de plus, des établissements sédentaires et permanents'; besides discovery, &c. there must be sedentary and permanent establishments. 'Le Petit Nord' was not severed from the Newfoundland administration, because no private holdings were acquired; no private holdings were acquired, because no sales took place; no sales took place, because there were no French establishments to sell; without establishments permanent and sedentary there could be no French

[1] Hist. of Newfoundland, pt. 2.
[2] Instit. du Droit de la Nat. et des Gens, p. 154.

possession, no national title, and no reservation of an exclusive fishery as part of that title.

The reservation theory is essentially modern, and suffers nothing in the hands of M. Ribot or M. Waddington. But its object, the vindication of an exclusive right for French citizens within the treaty bounds and the introduction of French jurisdiction to secure that right, is old and crops up continually in the diplomatic correspondence of the last 130 years. M. Sandeau 'infers' the exclusion of the English 'from the mere wording of the thirteenth Article of the Treaty of Utrecht[1].' The best expression of this view will be found, I think, in the so-called Treaty of Commerce which Louis XVI made with the revolting colonies of England in 1778. Its tenth Article provides[2]: 'Les Etats-Unis, leur Citoyens et Habitans ne troubleront jamais les Sujets du Roi T. C. dans la jouissance du droit de pêche sur les Bancs de Terre-Neuve, non plus que dans la jouissance *indéfinie et exclusive* qui leur appartient sur la Partie des Côtes de cette Isle désignée dans le Traité d'Utrecht.' The word 'indéfinie' I take to mean unrestricted, unlimited, and not merely 'general,' as M. Flourens[3] would infer. The French claim under the treaty would then be for an unrestricted and exclusive enjoyment of the fisheries which lie within the prescribed limits.

Now what are the provisions of Utrecht which deal with the right of fishery? They are directed 'to the subjects of France' ('Subditis Gallicis,' 'ausdits Sujets de la France'), not to the king nor to the country. They are mandatory injunctions: 'it shall not be lawful for,' 'it shall not be permitted to' ('nec . . . illicitum erit,' 'neque . . . permissum erit,' 'il ne leur sera pas permis'). So far as they can be considered rights, they take effect by way of exception to prohibitions. French subjects shall not

(*a*) 'fortify any place in the said island';

nor (*b*) 'erect any buildings there besides stages made of boards and huts' ('praeter contabulationes et turguriola,' 'des Echaffauts et Cabanes');

nor (*c*) 'resort to the said island (dictam insulam . . . frequentare) beyond the time necessary for fishing and drying fish';

nor (*d*) 'catch fish and dry them on land' ('piscaturam exercere et pisces in terra exsiccare,' 'de pêcher et de sêcher le poisson') except between Cape Bonavista and Point Riche.

I fail to see wherein this arrangement confers any national jurisdiction on France or her king, or gives an exclusive or unrestricted right of any kind to her nationals. It may permit her subjects, by

[1] Revue des Deux Mond., 3me Pér., t. 6. p. 130.
[2] Martens, Rec. des Trait., t. i. p. 690.
[3] New Review, July, 1890, p. 40.

way of exception to the ideas of alienage then prevailing, to come within a specified portion of British territory and exercise a particular industry there; but it allows this only under special conditions and subject to defined limitations. It does not and does not pretend to exclude the English, for the whole island is theirs: its object is to admit the French. Any collection of treaties will give you many similar cases. Thus, under the Convention of 1818[1], the people of the United States may fish in the waters of the Labrador. Are Newfoundlanders therefore excluded? They may also land and 'cure their catch on unoccupied places,' and bargain with the owners for the use of 'places occupied.' Does this prohibit British subjects from resorting thither and pursuing the same industry in the same way? Or does it prevent Labrador residents from casting a seine in their own waters and preparing their haul for market on their own holdings? Under the French system of interpretation, it would import likewise the jurisdiction of the United States and oust the sovereignty of the grantor.

Much correspondence has passed and many resolutions been framed in French and English on the question, What is the content of the word 'fish' (piscis, poisson) used in the thirteenth Article? Does it include salmon, herring, halibut, or codfish only? According to Abbé Raynal, 'morue' (codfish) is the only thing that makes Newfoundland interesting. An agreement[2] is concluded between the nations to determine by arbitration whether the term extends to lobsters, whether 'fishing and drying fish' fairly comprehends 'the catch and preparation of lobsters,' and whether a power conferred in 1713 'to erect buildings necessary and usual for drying fish' justifies the erection of canning factories and lobster-plant. I do not wish to anticipate the award of the arbitrators in any way; but, let me ask, how is Newfoundland interested in contesting the points raised? So long as her old law regarding aliens obtained, so long as she forbad them to acquire, hold, and transmit landed property, the question had practical importance. But since 1884 any Frenchman or other foreigner can obtain land on the island on the same terms and deal with it as freely as a natural-born subject. Sir William Whiteway estimates the present value of the French establishments between Cape Ray and Cape St. John at £35,000. Wherein can it prejudice Newfoundland if that capital be increased ten or twenty times, or the industries prosecuted with it be diversified no matter to what extent, so long as her jurisdiction is maintained? On the other hand, how can she prevent the operation, except by reverting to

[1] Conv. Gt. B. & U. S., Art. 1.
[2] B. Bk. N. F. Fisheries (Fr. No. 2), 1890-1, p. 94.

eighteenth-century ideas and re-imposing her old law against aliens? It may be a question for French investors whether they should expend money on a foreign shore and under another jurisdiction than their own; but, I imagine, Newfoundland's advantage lies in facilitating the process by every means within her power.

In one event, but that improbable, the arbitration proceedings may become more than academic. Article 4 deals with 'subsidiary questions' on the text of which the Governments shall have agreed. If you ask what manner of questions these are to be, you receive no answer from the Parliamentary debates or the declarations of English ministers. But M. Ribot tells the Senate that the Article was introduced at the instance of his Government (à notre demand) so as not to bar all matters of detail, and that one such matter only is contemplated or could be entertained, namely, 'quelle est l'étendue de la zone sur la quelle pèsent nos droits à l'encontre l'Angleterre'; our rights as against England, what zone do they cover? However interesting it may be to know that the sovereignty of the Treaty Shore is a mere matter of detail, subsidiary to the 'catch and preparation of lobsters,' a previous question arises: May not the men of St. Malo pursue the crustacean in Newfoundland waters without creating zones or having zones created for them, without imposing their jurisdiction on the island? When the text of the submission is forwarded, I should not wonder but the English minister of the day will show that this item was settled long since and so definitely that no court of arbitrators can make it plainer, and will point to France's abandonment of all right and claim to right, of all zones and claim to zones, within Newfoundland for all time under the thirteenth Article of the Treaty of Utrecht.

We are next told that subsequent treaties enlarge the French rights. The first adduced is that of 1763, article 5[1] of which says: 'The subjects of France shall have the liberty of fishing and drying (auront la liberté de la pêche et de la sêcherie) on a part of the coasts . . . specified in the thirteenth Article of the Treaty of Utrecht, which is renewed and confirmed (re-nouvellé et confirmé) by the present treaty.' Is this an enlargement? The only word notable is 'liberty.' In 1713 we had permission or allowance. But if 'right' had been used, what difference would it have made? The next, which is the last treaty before 1792, takes its name from Versailles[2]. Its fifth Article changes the limits and adds: 'French fishermen shall enjoy the fishery (jouiront de la pêche) which is assigned to them by the present Article as they had the right to

[1] Martens, Rec. des Trait., i. p. 33; Jenkinson, vol. iii. p. 182.
[2] Martens, Rec. T., ii. pp. 465–6; Jenkinson, vol. iii. p. 257.

enjoy that (comme ils ont eu droit de jouir de celle) which was assigned to them by the Treaty of Utrecht.' The treaties contain nothing further on the question of right, but where is the enlargement? Everything is referred back to the Utrecht arrangement. If that instrument had contained only a bare avowal of England's sovereignty and a mere abnegation by France; if French fishermen might occupy the shore permanently, fortify and erect substantial buildings; if they might form 'établissements sédentaires' while the English, as we shall see, were forbidden so to do under 10 & 11 Will. III; an arguable case might arise to support the present demand of France. But Bolingbroke and Prior, whatever mischief they may have done, provided expressly against this danger.

The royal instructions[1] issued to the Newfoundland governors for the regulation of the Treaty Shore are very precise. They are to exercise the utmost diligence (1) to prevent any lands, rivers, islands between Cape Bonavista and Point Riche being taken possession of as private property, (2) to prevent the formation of any fixed establishments that might prejudice the French fisheries, or (3) render ineffectual the instructions that the ships of both nations should choose their stations as they arrive, conformably to the provisions of 10 & 11 Will. III. Count Vergennes made complaint that the French industry was interrupted by the erection of establishments; whereupon Lord Stormont sent him a copy of these instructions, which he accepted as satisfactory[2]. Up to that date, which is 1776, there was a fishery of both nations within the treaty-limits, called by the English a 'floating,' 'free' or 'ship fishery,' and by the French 'une pêche errante.'

The terms laid down at Utrecht are not changed in the body of any treaty, but we are told that certain enlargements of the French right took place under the English Declaration attached to the treaty of 1783, under the Acts of Parliament passed to carry the treaties into effect, and under proclamations issued by governors of Newfoundland. We shall take these in connexion with the reasons assigned in the Treaty of Versailles for altering the limits. The operative clause for this purpose is: 'His M. C. Majesty, in order to prevent the quarrels that have heretofore arisen between the two nations of England and France, consents to renounce' the fishery between Cape Bonavista and Cape St. John on the northern shore. He is compensated by an extension on the western coast from Point Riche to Cape Ray. The quarrels referred to are those to which Count Vergennes called attention in 1776. The two

[1] Bd. Trade & Pl., May 6, 1765, entries H. 435.

[2] See Reeves' Hist., p. 130; also Desp. *Stormont* to *Vergennes*, *Vergennes* to *Stormont*, extracted in Statement annexed to Desp. *Salisbury* to *Waddington*, July 9. 1889; Yellow Bk. 1890–1.

courts agree that from some time after 1763 there had been going on throughout the renounced coast a triangular competition which resulted in a triangular duel. There was an English floating fishery favoured by English law, a French floating fishery favoured by French law and treaty, and a local or sedentary fishery, at times encouraged by the skippers of both nations, but in the long run antagonistic to the interests as well of the English as of the French. Prohibition of settlement, threats of expulsion, denial of landed property, denial of justice had been tried to crush it, and persistently tried, but in vain; so that, in 1783, there was no alternative but to remove the treaty limits. This end was effected by Article 5.

The published papers[1] tell us that Count Vergennes made a strong effort to carry out the traditionary policy of France and obtain sole enjoyment of the new limits, first by an express clause in the treaty, then by a like clause in the English Declaration. Succeeding in neither attempt, he prefaced his draft acceptance of the English proposals with these words: 'as to the *exclusive* fishery on the coasts of Newfoundland.' His dropping of the word 'exclusive' may not determine this controversy as against France, but it militates against her claim. On the other hand, if he had insisted on its retention, and if the Duke of Manchester, as he was in that event instructed, had made a second declaration to bar the constructive inference, no consistent meaning could be extracted from the declaratory provisions of 1783, and we should be thrown back on the words of the treaty given above.

'The cause of quarrel,' the sedentary fishery from Cape Bonavista to Cape St. John, having been eliminated from the body of the treaty, the English declaration propounds its purpose 'to prevent even the least foundation of dispute for the future.' Its means are contained in paragraphs 2 and 3, with which His Majesty of France declares that 'he is fully satisfied.' The first sentence of paragraph 2 bears evident marks of the fray from which it sprang and reads as follows: (*a*) 'to this end [as above quoted] and (*b*) in order that the fishermen of the two nations may not give cause for daily quarrels, H. B. Majesty will take the most positive measures for preventing his subjects from interrupting in any manner (ne troublent en aucune manière), by their competition, the fishery of the French during the temporary exercise of it which is granted to them on the coasts of Newfoundland; and (*c*) he will, for this purpose, cause the fixed settlements which shall be formed there to be removed' ('et elle fera retirer, à cet effet, les établissements

[1] Statement in Desp. *Salisbury* to *Waddington*, July 9, 1889; Fitzmaurice, Life of Shelburne, vol. iii. 260, 288, 318–9.

sédentaires qui y seront formés'). Three interpretations have been evolved: (1) the limits shall be kept free from fixed establishments, English and French; (2) English establishments shall be removed in case and in so far as they interfere with or interrupt French fishing; (3) English establishments shall be removed in any event. Construction marked (2) has found most favour among the English. Clauses (*b*) and (*c*) are then taken to form a double apodosis. French authorities have fluctuated between interpretations (2) and (3). Number (1) receives much support both from law and history, and requires that clause (*b*) be read as an amplification of clause (*a*). If the whole sentence be construed in the strongest sense against the English and not, as modern law would require, against the claimant; what then? Does it give the French the right of setting up 'établissements sédentaires' or the power of exercising what they now call 'predominant control'? The second sentence of paragraph 2 is a police-provision, and says that the King of England 'will also give orders that the French fishermen be not incommoded (ne soient pas gênés) in cutting the wood necessary' for repairs.

Paragraph 3 is directed to both parties. (1) 'The thirteenth Article of the Treaty of Utrecht and the method at all times acknowledged shall be the plan upon which the fishery shall be carried on there' ('sera le modèle sur lequel la pêche s'y fera'), that is, within the new limits, between Cape Ray going by the north and Cape St. John. (2) 'It shall not be deviated from by either party' ('on n'y contreviendra pas, ni d'une part ni de l'autre'). What a pretence is it then to say that the English are to be excluded from the bounds? (3) By way of elaboration we have, on one side, the French (*a*) 'building only their scaffolds,' (*b*) 'confining themselves to repairs,' and (*c*) 'not wintering there'; and, on the other, the English (*a*) 'not molesting them in any manner' ('ne molestent aucunement'), (*b*) 'nor injuring (ni ne dérangeant) their scaffolds during their absence.'

The provisions of the Treaty of Utrecht are already given; what then is 'the method at all times acknowledged' ('la méthode de faire la pêche qui a été de tout tems reconnue')? The older history of Newfoundland is an answer to the question. In form of law, it is 'the ancient custom' stereotyped by the Star Chamber (1633), amplified by 'The Additional Regulations' (1670), perfected by 10 & 11 Will. III. c. 25 (1697), and repealed in 1824. You will find it described as a practical system in Whitbourne's Discourse (1621) and in Reeves' History (1793). Mr. Hatton has cast the glamour of his imagination round it in his novel 'Under the Great Seal.' The most graphic representation of it comes from Mr. Knox, who, as Under-Secretary of State and later as Merchant Adventurer,

had much to do with Newfoundland. He was called before a committee of the House of Commons in 1792 to state the policy of the laws relating to the island, and said[1]: 'Newfoundland had been considered in all former times as a great English ship moored near the banks for the convenience of English fishermen. The Governor was the ship's captain, and those engaged in the business were his crew, subject to naval discipline when there, and bound to return to England at the end of the season.' If you substitute France for England, French for English, you get the French conception of the plan of fishery pursued in Newfoundland. The Marine Ordinance condenses the Star Chamber Regulations[2]. The method is therefore common to both nations, and is well described as 'acknowledged at all times.' It provides for an annual migration to be followed by an annual return, for an open or free fishery, a ship fishery or pêche errante as distinguished from a sedentary fishery, for temporary not permanent holdings, temporary not permanent buildings. But these are, as we have seen, the provisions of the thirteenth Article of the Treaty of Utrecht. There are, then, not two plans but one plan to obtain within the new limits and to be equally enjoyed by French and English.

The action of both nations has since confirmed this view. It runs throughout the negotiations and correspondence of England. Newfoundland inherited and now holds it. It is the interpretation which this country professed to the United States in 1818[3], when she gave their citizens the right of fishing within that portion of the new limits which lies between Cape Ray and the Quirpon Islands 'for ever in common with British subjects.' France is bound by it indirectly. In the season of 1821–22, she warned off certain United States schooners and forbade them to fish within the district mentioned; whereupon there passed a brisk correspondence between Count Chateaubriand and Mr. Gallatin, which is supplemented by Mr. Rush[4]. As result, the notice given was allowed to drop, and American fishermen from Gloucester and other ports have since resorted regularly to the coast without interruption.

But it is said that French rights as against British subjects are enlarged by the Acts of Parliament passed to carry the treaties into effect. If it were so, it were a grievous fault of the Legislature. There are two Acts[5]: one dated 1788, five years after the Treaty of

[1] See Evid. in Rept. H. of C. Newf. Fisheries, 1793.
[2] Ordon. de la Mar. du Mois d'Août, 1681, Liv. v. Tit. vi.
[3] Convention, Art. i.
[4] St. Pap. U. S. For. Rel., vol. v. p. 508 et seq. *Rush* to *Gallatin*, Oct. 1, 1822; Rept. Aug. 12, 1824.
[5] 28 Geo. III. c. 35; 5 Geo. IV. c. 51.

Versailles; the other 1824, nine years after the general peace. The first recites the treaties and declarations in full and provides for their execution simply. The second deals with many subjects, repeals a number of Acts, among them 10 & 11 Will. III, consolidates others, and directs how the island shall be governed. It does not recite the treaties, but provides for the carrying out of such as 'are now in force between His Majesty and any Foreign State or Power.' Two foreign nations were then interested in the western fisheries of Newfoundland. Both Acts authorize the issue of Orders in Council and, 'in case it shall be necessary' for the due execution of the treaties, the destruction of stages, flakes, &c., and the removal of persons. Neither of them empowers naval officers to hit off their own bat, commits the regulation of the shore to their discretion, or exempts them from responsibility for their actions. Both direct trial before the courts at St. John's or Westminster, in case the treaty provisions be infringed, the penalty on offenders under the older statute being £200 and under the later £50. The second does not purport to revive the first, which had fallen with the treaty more than a quarter of a century before. It may be questionable whether the later statute revived or was intended to revive the declaratory provisions of 1783 as part of the situation of 1792, in so far as British subjects are concerned, because it repealed 10 & 11 Will. III, which gave the English 'model' the force of law. The chief point for us is that both statutes recognize the competency of the local courts to decide all questions that may arise under the treaties and to adjudicate on the action of the naval officers.

Two proclamations of Newfoundland governors are cited; one dated 1822, the other 1827. The first may be dismissed because it is put forth 'in pursuance of the Act of Parliament in that behalf,' while in 1822 there was no such Act. The second is regular and bears the name of a governor distinguished in colonial annals, Sir Thomas Cochrane. It purports to be issued on a report of outrages committed on the French and their property, threatens offenders with 'the utmost penalty of the law,' and authorizes French as well as English officers to apprehend and bring to justice at St. John's 'all persons detected committing such offences.' No trial was had under either Act of Parliament or in pursuance of either proclamation. The outrages may have ceased or the reports may have been exaggerated.

The declaratory provisions, the Acts of Parliament, the proclamations were all framed to foster the ship or model fishery within the treaty limits. But a fishery has sprung up which is sedentary, and France calls on England to put the removal clause in operation as against British subjects. To this demand many

answers are returned, two or three of which may be of general interest.

1. Neither England nor her colony has taken active steps to encourage settlement. While the island remained under her control, England did what in her lay to prevent its being peopled, and since that time has kept this particular district, to use Lord Salisbury's expression, 'in a state of siege.' I do not question Newfoundland's jurisdiction and responsibility, but, so far as I can learn, she has neither governed nor been permitted to govern the Treaty Shore. She has not surveyed it, cannot grant a clear title to an acre of it, and does not profess to give security of tenure from Cape St. John going by the north to Cape Ray. Her attempts at collecting customs dues have constantly been foiled, and her administration of justice has been negative rather than satisfactory. The weightiest charge that can be brought against England and her colony in regard to this shore is that they have accepted a state of facts not of their own choosing, and, in deference to French susceptibilities, have refrained for too long time from interfering with a condition of lawlessness which is not creditable to either of them. They have been wanting in their duty to their own people rather than towards France.

2. The French are themselves responsible for what English settlement there is within the treaty limits. I do not say that from the breaking out of war till the re-imposition of the foreign right, from 1792 till 1815, no Newfoundlanders, Nova Scotians or others made their homes within the bounds, a law unto themselves; but accept the statements of M. Sandeau [1], who knew the region well, of M. Flourens [2] and M. Waddington [3], that in the early years of this century the district was practically desert, and that settlement, the settlement complained of, was begun and developed in connexion with the 'établissements sédentaires' which the French fishermen put up. These owed their existence to bounty laws of the later Kingdom, Empire and Republic. It is well known that Louis XIV's bounties fell in the general crash of privileges that makes August 4, 1789, memorable. But with the peace a new and more formidable regime was inaugurated. The system grew step by step until the national will obtained full expression in the law of 1851 [4], which, renewed from time to time and reinforced in 1881, was in 1891 continued till 1901 [5]. The French were confined by treaty and declarations to scaffolds and huts with temporary possession; but, ignoring these, they took firm hold in late years of

[1] Revue des Deux Mond., 3me Pér., t. 6, p. 136.
[2] New Rev. 1890, p. 44.
[3] Desp. July, 1889; Dec. 31, 1890.
[4] Sabine, Fisheries, pp. 34–5.
[5] B. Bk., N. F. 1890–1, p. 22.

the Treaty Shore. They divided it into sections of the first, second and third series. Within each series they allotted 'places' to be held for five years, and at the end of each quinquennial period to be raffled for in Saint Servan and Saint Malo. To each series they attached bounties, and as a condition of the bounties prescribed the character and tonnage of the ships to be used, the number of men to be employed, the buildings to be erected, and fishing appurtenances to be supplied. In 1857[1] there were 71 harbours occupied and 133 'places' assigned. Their establishments, valued in 1890 at £35,000, and giving employment to 12 vessels, were then much more considerable and engaged 300 decked ships. The English were sought for as caretakers of buildings during winter, repairers of boats, nets and outfit, hewers of wood and drawers of water for their masters, who, in the exercise of what they now call their 'predominant right,' supplemented their scanty wages by grants of fisheries. The residents had grown to 3,500 in number by 1857. Now, the question is not whether France is pleased or displeased with the result of her labours, whether the process has been beneficial or the reverse to Newfoundland, but whether this country or the colony is bound to ensure France against the consequences of her own policy, to indemnify her for her own wrong[2]? It seems to me that our friends across the Channel are asking a great deal, and do not improve their case when they add that these 'foreigners,' the residents whom they would remove, whose nets and fishing tackle the French navy are instructed to seize and confiscate, have increased more rapidly under their no-government than many peoples under the best recommended system, 350 per cent. in 40 years.

There are now on the Treaty Shore 12,000 persons all told. What are you going to do with them? Expel them; in order to plant a French population in their stead, three families to every mile of coast, to be fostered under the currency of the bounty laws? A project of the kind will be found in the Conventions of 1857 and 1885. Newfoundland has hitherto warded off this danger from British North America. Canada owes it to her that the avenues of the Gulf, the gateways of the St. Lawrence, are not under the control of a foreign power. But if a French people is not brought in, what prospect have you? Shall there be no ingathering of a second English population under the present stimulus? While the bounty system continues, the experiment of expulsion and re-peopling may go on indefinitely.

[1] N. F. Journal, App. I. Reports of Kelly and Prendergrast.
[2] See Desp. *Waddington* to *Salisbury*, July 25, 1887.

Let us admit the legality of the French demand for a moment. A doubt may then arise whether the English establishments are removable unconditionally or on condition proved in each case by trial. But how about the establishments of France, the 'établissements sédentaires' now within the limits? They get no countenance from the treaties, none from the declarations, none from imperial statutes, none from local laws. They are illegal in any view of the question, lie open to summary proceedings or action by way of ejectment. France has so often threatened to oust 'the foreigners' with a high hand that we can scarcely refrain from asking how she would like the tables to be turned. What if the treaties and declarations were executed against her 'in all their extent and in all their rigour'?

But the 'model' of the treaties and declarations is scarcely possible in the nineteenth century. Among other things it implies, on one side, the most absolute communism known to modern law; on the other, the government of a people by naval discipline, intermittently applied. In so far as Eastern Newfoundland is concerned, the system fell of its own weight in 1824. The proceedings of the French themselves have made its continuance impracticable within the treaty limits. What remains then of the old treaties that is executable to-day? what rights may the French fishermen enjoy by virtue of them? This will be the main question to be dealt with by the new court to be established either under colonial or imperial law. Their right and measure of right, I imagine, will be found to be very similar to those which the citizens of the United States enjoy on the Labrador coast under the Convention of 1818. From our point of view fisheries may be said to be of three kinds, and to be distinguished according to the use made of the shore. First, there is a mere ship-fishery without occupation of land. This is open to the nationals of both, those of the United States taking fish 'of every kind,' the French, it would seem, being restricted to those kinds which in 1783 or 1713 were usually dried. Next, there is a fishery which makes temporary use of the land. 'Unoccupied places' may be used by the citizens of both Republics; both may bargain for the use of 'places occupied.' Thirdly, there is the sedentary fishery to which the others lead in the long run. It uses the land not casually but permanently, and as a basis of operations. It is not open to the fishermen of either France or the United States under existing international arrangements. The question of its opening is one of policy for Newfoundland. She is not interested in promoting a foreign industry, but she is much interested in the developing of her own shore and coastal waters. In this point of view, if

further legislation should be desired, it might be well to legalize by special Act all French holdings now between Cape St. John and Cape Ray, to hold out inducements to the fishermen of that nation to settle within the island, granting them as free access to the land, as full use of the coastal waters, as large a measure of civil rights, and as perfect protection for person and property as Newfoundlanders now have or may hereafter obtain.

T. B. Browning.

FORMS OF MERCANTILE CONTRACTS[1].

A PERUSAL of the opening sections (sections 1 to 15) of the Sale of Goods Act, 1893, will give a clear indication of the important requisites for a valid contract for the sale of goods. There must be (1) a seller and a buyer, both having legal capacity to buy and sell; (2) a mutual agreement to buy and sell; (3) a thing sold; (4) a price express or implied; and (5) contracts for the sale of goods of the value of £10 or upwards are not enforceable by action unless the buyer (*a*) accepts part of the goods so sold, (*b*) gives something in earnest to bind the contract or in part-payment, or (*c*) unless some note or memorandum of the contract be signed by the party to be charged or his agent in that behalf.

In the ordinary case where *S*, the seller, sells goods to *B*, the buyer, and *B* acknowledges the contract in writing, there is no difficulty. *S* holds *B*'s 'Bought Note,' 'I have this day bought from you,' and can bring an action against *B* on it if necessary. *B* holds *S*'s 'Sold Note,' 'I have this day sold to you,' and can bring an action against *S* on it if necessary.

But when one or more brokers between the seller and the buyer are concerned in the sale the matter becomes more complicated. Take the case of the broker acting both for buyer and seller and receiving his commission from the seller. If the broker makes his contracts carefully, that is, sends out a bought note to the seller, 'I have bought from you for my principals,' and a sold note to the buyer, 'I have sold to you for my principals,' the contract is valid between buyer and seller. The seller holds a document which binds the buyer as it is signed by his agent, and the buyer holds a document signed by the seller's agent which binds the seller.

Sometimes the broker contracts as a principal. Sometimes he does not send his principal any contract at all, but merely an advice note stating the terms of the sale or purchase. He tells his principal in effect, 'I as your agent have bought *for* you 100 bales of cotton,' or, 'I have sold *for* you 100 bales of cotton,' as the case may be.

These advice notes are clearly not contracts sufficient to satisfy

[1] Taken from a series of six lectures on Mercantile Contracts, delivered at University College, Liverpool, November and December 1894, under the auspices of the Board of Legal Studies, Liverpool.

the fourth section of the Sale of Goods Act. They are not notes or memoranda of contracts signed by the party to be charged or *his* agent. They are merely statements by an agent to his own principal of the mode in which he has executed a commission for his principal.

In cases of the sale of goods, having regard to the statute, it is the duty of the selling broker when acting purely as a broker to hold some document containing the terms of the contract signed by the buyer or the buying broker, and it is the duty of the buying broker to hold some document signed by the seller or the selling broker.

There is a difference between sales of goods and sales of shares or stock which it is well to notice in passing, as otherwise some confusion may possibly arise.

As regards contracts on the Stock Exchange there is no Act of Parliament which requires contracts for the sale of stocks, shares or debentures (shares in Joint Stock Banking Companies or Bank of England Stock excepted) to be in writing.

Therefore on the Stock Exchange it is not so necessary for a principal to see that he or his buying broker holds a contract signed by the seller or selling broker and vice versa. The contract for the sale of £1000 L. & N. W. Railway stock may be made between two stockbrokers by word of mouth, and consequently the usual document which the client who is the real buyer or seller in the transaction gets on the purchase of stock or shares is merely an advice note by his broker to say that he has bought or sold the shares *for* him—subject to the rules of the Stock Exchange, which give the broker buying or selling for the principal a right to buy in or sell out as against the broker or jobber from whom he, the broker, has bought or sold. But the client usually relies, and may safely rely, on his broker to get delivery of the stock for him. He is quite satisfied that his broker will get the stock or the price of it as the case may be.

A merchant either makes his contracts direct or through a broker, and so far as regards parties to the contract the forms in common use may be reduced to the four set out in the Appendix to this paper.

The first form is that used in cases where both parties contract as principals and is No. 1 in the Appendix.

Take the sold note first: it will not take long to go through it, and a concrete example is the best way of illustrating the points I wish to make.

It is addressed to the buyers and runs to the following effect—

'We have this day sold to you so much produce, to be paid for

> at such a price in cash on or before delivery if required, the produce to be delivered say ex warehouse into buyers' carts on say the 10th proximo and the contract is expressed to be made subject to the Rules, Bye-Laws and Regulations of the Blank Association whether endorsed hereon or not, or, as is sometimes put, Customary allowances and Public Sales Conditions.'

Then follow any special conditions, and the contract is signed by the sellers.

The rules of the different Trade Associations vary according to the customs of the different trades.

Four important points, however, are almost invariably dealt with. These are—

(1) The effect of Bankruptcy on the Contract.
(2) The incidence of the fire risk.
(3) Weekly settlement of differences, and
(4) Arbitration.

Generally it may be taken that under these Trade Rules the Bankruptcy of either party to the contract gives to the other the right to close the contract at the market price of the day.

That risk of fire remains with the seller until delivery of the goods to the buyer. This is an alteration of the law by which the risk passes when the property passes and not necessarily on delivery.

And that an arbitration clause is inserted providing that all disputes shall be referred to some member or members of the particular trade to be appointed in case of difference by the President or Vice-President of the Trade Association.

A right of appeal is frequently given from the first arbitrators to a second tribunal, which is variously constituted in the different trades.

A full analysis of the various rules is not practicable, and I have only thought it necessary to indicate general principles.

The bought note must correspond exactly with the sold note. It is addressed to the sellers and commences—

> 'We have this day bought from you so much produce, to be paid for at such a price in cash on or before delivery if required, the produce to be delivered say ex warehouse into buyers' carts on say the 10th proximo, and the contract is expressed to be made subject to the Rules, Bye-laws, and Regulations of the Blank Association whether endorsed hereon or not.'

Then follow any special conditions which must correspond to those in the sold note, and the bought note is signed by the buyers.

In this form of contract both parties contract as principals. The two documents together constitute the contract. The seller

can bring an action against the buyer on the bought note, and the buyer has equal rights against the seller on the sold note.

In the simple case I have just given there are only two parties to the contract.

More frequently, however, a broker is concerned on one side or the other. This gives rise to a second form of contract—the broker's contract—in which the broker, if the contract is properly made, incurs no personal liability, takes a commission and merely acts as agent in forming the contract between the buyer and the seller. In such a case there are or may be four parties—the seller, the selling broker, the buying broker and the buyer.

The selling broker and the buying broker may be and sometimes are represented by one person only, but in this case it is essential for the validity of the contract that such person should be the agent both for the buyer and seller lawfully authorized to sign a contract on behalf of both.

This second form of contract, No. 2 in the Appendix, is based on No. 1 and usually runs as follows:

The 'sold note' is addressed to the buyers. It runs—

> 'We have sold to you for our principals Messrs. *S & Co.* so much produce, to be paid for at such a price in cash on or before delivery if required, and to be delivered say ex quay on the 10th proximo, and the contract is subject to the Rules, Bye-Laws and Regulations of the Blank Association whether endorsed hereon or not. Brokerage ½ per cent. or as the case may be, and the note is signed "*X*, Broker."'

The bought note in a similar manner is addressed to the sellers and commences—

> 'We have this day bought from you for our principals Messrs. *B & Co.* so much produce, to be paid for at such a price in cash on or before delivery if required to be delivered say ex quay on the 10th proximo and the contract is subject to the Rules, Bye-Laws and Regulations of the Blank Association whether endorsed hereon or not. Brokerage ½ per cent. or as the case may be, and the note is signed "*X*, Broker," or possibly, if the selling broker and the buying broker happen to be the same, "*X*, Broker."'

Sometimes the form runs—

> '*S & Co.* have this day sold and *B & Co.* have this day bought, and the note is signed "*X*, Broker," and a signed copy sent to *A* & *B*.'

The practice among brokers as to the making and entry of contracts varies greatly. One broker will make three notes of the contract, the first of which will be entered in the broker's contract

book and be signed by him. It will contain a full note of the contract, the names of the buyer and seller, the price and all other conditions. He will also copy out the contract on a contract form and send one copy to the buyer and another copy to the seller or to the buying broker or selling broker as the case may be. He will send also to his principal, whether he is buyer, or seller, an advice note of the purchase or sale, and when these three duties are performed things cannot go far wrong in case of a lawsuit, provided all the documents agree.

Another broker will content himself with an unsigned entry in the contract book, and in such a case the 'memorandum in writing' necessary to satisfy the statute of 1893 must be found in the bought note or the sold note which is sent to the buyer or seller. If the buyer wishes to proceed he must produce a contract signed by the seller or his broker and vice versa.

Another will make no entry at all in the contract book, and unless the bought notes and the sold notes correspond there is sure to be trouble.

Another, say a buying broker, will send an advice note of the contract to his principal, e. g. 'I have this day bought for you,' and if he gets no sold note from the seller or selling broker the purchaser may find that in case of matters going wrong with the buying broker, he, the purchaser, cannot hold the seller to his contract.

A note commencing 'I have bought *for* you,' or 'I have sold *for* you' is a mere advice note as between principal and agent, and not a contract. It is a document on which the broker only may be liable, and the broker discharges that liability if he can produce a contract, and though the principal often does and usually may rely solely on his broker, and does not scrutinize too closely the form of his contract, it may be of great importance to him on some occasions to know that the contracts are properly made and that the bought note is in existence.

To sum up the position, the buyer may rest satisfied, as far as the form of the contract is concerned, if he or his broker holds a sold note signed by the seller or the selling broker, and the seller may be content if he or his broker hold a bought note signed by the buyer or the buying broker. The bought and sold notes must correspond.

It is an additional security both to buyer and seller if the broker, when acting for both parties, keeps a contract book and enters particulars of all contracts in this book and signs them. In such a case the contract in the broker's contract book is the primary contract, and the bought and sold notes which must correspond with the contract in the contract book are evidence of the contract.

The contract in the auctioneer's book is in effect a broker's contract, and in fact the auctioneer, who is the agent of the seller to sell and the agent of the man in the crowd to buy, is a good instance of a broker authorized to sign for both parties and binding them both by the entries in his book.

Such experience as I have had leads me to believe that in the press of business in modern times the broker's contract book is going out of fashion, and the true record of the contract of sale is to be found in the sold note and bought note.

It will no doubt be a sufficient compliance with the statute if the seller or his broker acknowledges the bought note sent him by the buying broker, or if the buyer or his broker acknowledges the sold note sent him by the selling broker, but it is more regular to have both bought note and sold note in existence and to ascertain that they correspond.

A third form of contract, form No. 3 in the Appendix, is used in cases where the selling and buying brokers guarantee their respective principals and charge a *del credere* or guarantee commission.

The only variation is that the form of sold note commences—

> 'We acting on account of Messrs. *S* whose fulfilment of contract we guarantee have this day sold to you acting on account of Messrs. *B* whose fulfilment of contract you guarantee so much produce,' &c., as before;

and the form of bought note commences—

> 'We acting on account of Messrs. *B* whose fulfilment of contract we guarantee have this day bought from you acting on account of Messrs. *S* whose fulfilment of contract you guarantee so much produce,' &c.

Here there is a contract between *S*, the sellers, and *B*, the purchasers, guaranteed by the selling and buying brokers respectively, who charge or should charge a *del credere* commission to their respective clients. This is the safest mode of contracting with firms who have foreign principals, and care must be taken to see that the foreign principals recognize the contract, and it would perhaps be an additional security that the selling and buying brokers should each get a distinct confirmation of the contracts so made from the principals for whom they act.

A fourth form of contract is very generally used, by which the rights of the buyer and seller, if not disclosed on the face of the contract, are excluded. The form, which is similar to form No. 1, contains the following clause:—

> 'The contract of which this is a note is made between ourselves

and yourselves and not by or with any person, whether disclosed or not, on whose instructions or for whose benefit the same may have been entered into.'

Sometimes the clause runs as follows—

'The rights and liabilities of principals not disclosed on the face of this contract are excluded.'

But the principal must assent, and if he allows his agent to assume the character of a principal he must take the consequences.

The form containing words to this effect was devised to meet the decision in the well-known case of *Cooke* v. *Eshelby*, 12 App. Ca. 271, decided in 1887 to the following effect—

'Where an agent *X* sells in his own name for an undisclosed principal *S* and the principal *S* sues the buyer *B* for the price, the buyer *B* cannot set off a debt due from the agent *X* unless in making the contract he *B* was induced by the conduct of the principal *S* to believe, and did in fact believe, that the agent was selling on his own account.'

The four forms which I have just analyzed relate chiefly to the parties to the contract. There are also four forms in use, the terms of which relate mainly to the position of the goods sold. These are 'spot' contracts, 'arrival' contracts, 'f. o. b.' contracts, and 'c. i. f.' contracts.

A sale of goods for immediate delivery is known as a 'spot' sale. A sale of goods 'to arrive' is known as an arrival contract, and if the goods do not arrive at the port stipulated in the contract the contract is void. Sometimes the contract is so worded that if the vessel does not arrive the contract is void, and it has been held where goods were sold to arrive by a particular steamer with a memorandum in the contract to the effect that should the vessel be lost the contract was to be void, that there is a double condition and that the contract took effect only if the vessel arrived, *and* if on arrival the goods were on board. The forms of arrival contract are now much elaborated, and usually there are provisions in the contract expressly providing for the case of part of the goods being lost and part being transhipped and forwarded.

Another form of contract is the f. o. b., or free on board form, under which the seller puts the goods sold on board a vessel named by the buyer free of all charges to the buyer, and the goods are then at the buyer's risk subject to the seller's right to stop them in transit, provided the seller remains the holder of the shipping documents.

Another special form of contract is the c. i. f., or cost, freight, and insurance contract. Under this form of contract the buyer

pays the seller a lump sum which covers the cost of the goods and the cost of insuring the goods, and is credited by the seller with the amount of the freight which he will have to pay to the shipowner on the delivery of the goods. The seller takes out the policies and ships the goods, handing the buyer the bill of lading and the policy against payment either in cash or more usually by drafts.

Should the ship arrive with the goods on board the buyer will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy.

In substance therefore the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way. See Lord Justice Blackburn's judgment in *Ireland* v. *Livingston*, L. R. 5 H. L. 406.

An ordinary form of the c. i. f. contract is as follows—

> 'We *S & Co.* have this day sold to you *B & Co.* so much produce at per lb. cost freight and insurance, to be shipped per the ss. *X* from say Galveston to Liverpool during the month of September. Marine insurance with first-class companies covering particular average and 5 per cent. in excess of invoice cost to be provided by seller. Payment by our drafts upon you at days' sight or payment shall be made in exchange for shipping documents or (at buyer's option) before the arrival of the vessel, or failing previous arrival not later than 75th day after date of bill of lading in cash.'

The bought note signed by or on behalf of *B & Co.* should be in similar form.

With these eight forms of mercantile contracts it will not be difficult to frame or to follow other forms. Year by year these forms are becoming more elaborate both in England and America, and the interpretation of them is becoming more and more difficult even for the skilled arbitrators who are frequently called upon to give decisions upon them; but on the whole the outlines of the contracts are simple, and if buyers and sellers bear in mind the principles laid down above some of those difficulties will be avoided which now frequently arise when these or similar contracts come before either arbitrators or judges of Mercantile Courts.

H. D. Bateson.

APPENDIX.

CONTRACT.

FORM No. 1A.
PRINCIPALS ONLY.

SOLD NOTE.

No.....

Liverpool, ...1895.

To MESSRS. .....

We have this day sold to you :—

1. Quantity and description of Produce.....

2. Price and terms of payment } ..... { Cash (or before delivery if required) less 2½ per cent. discount.

3. Time and manner of delivery .....

4. Special Conditions :—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

.....

.....

.....

FORM No. 1B.
PRINCIPALS ONLY.

BOUGHT NOTE.

No.....

Liverpool,.....1895.

To MESSRS. .....

We have this day bought from you :—

1. Quantity and description of Produce .....

2. Price and terms of payment } ..... { Cash (or before delivery if required) less 2½ per cent. discount.

3. Time and manner of delivery .....

4. Special conditions :—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

.....

.....

.....

CONTRACT.

FORM No. 2A.

SELLING BROKERS ONLY.

SOLD NOTE.

No.....

Liverpool, ...1895.

To MESSRS. .....

We have this day sold to you for our principals Messrs. .....

.....

1. Quantity and description of Produce .....
2. Price and terms of payment } ..... { Cash (or before delivery if required) less 2½ per cent. discount.
3. Time and manner of delivery .....
4. Special Conditions:—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

.....

.....

Brokerage .....

.....

BROKER.

FORM No. 2B.

BUYING BROKERS ONLY.

BOUGHT NOTE.

No.....

Liverpool, ...1895.

To MESSRS. .....

We have this day bought from you for our principals Messrs. ..

.....

1. Quantity and description of Produce .....
2. Price and terms of payment } ..... { Cash (or before delivery if required) less 2½ per cent. discount.
3. Time and manner of delivery .....
4. Special Conditions:—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

.....

.....

Brokerage .. ..

.....

BROKER.

Contract.

Form No. 3A.

Selling Broker: Principal guaranteed.

Sold Note.

No.....

Liverpool, ...1895.

To Messrs. .....

We, acting on account of ..... whose fulfilment of contract we guarantee, have this day sold to you, acting on account of ..... whose fulfilment of contract you guarantee:—

1. Quantity and description of Produce .....
2. Price and terms of payment } ..... { Cash (or before delivery if required) less 2½ per cent. discount.
3. Time and manner of delivery .....
4. Special Conditions:—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

.....

.....

Brokerage .....

.....

Broker.

Liverpool, ... 1895.

Messrs. .....

We hand you above copy of Contract Note for..... Produce made by us on your account to-day, and your confirmation will oblige.

Yours, &c.,

.....

Broker.

Form No. 3B.

Buying Broker: Principal guaranteed.

Bought Note.

No.....

Liverpool, ...1895.

To Messrs. .....

We, acting on account of .....whose fulfilment of contract we guarantee, have this day bought from you, acting on account of.....whose fulfilment of contract you guarantee:—

1. Quantity and description of Produce.....
2. Price and terms of payment } ..... { Cash (or before delivery if required) less 2½ per cent. discount.
3. Time and manner of delivery .....
4. Special Conditions:—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

.....

.....

Brokerage .....

.....

Broker.

Liverpool, ...1895.

Messrs. .....

We hand you above copy of Contract Note for ..... Produce made by us on your account to-day, and your confirmation will oblige.

Yours, &c.,

.....

Broker.

BROKER.

BROKER.

CONTRACT.

FORM No. 4A.

SELLING BROKERS: Rights of Principals excluded.

SOLD NOTE.

No.....

Liverpool, ...1895.

To MESSRS. .....

We have this day sold to you:—

1. Quantity and description of Produce.....
2. Price and terms of payment } ..... { Cash (or before delivery if required) less 2½ per cent. discount.
3. Time and manner of delivery.....
4. Special Conditions:—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

.....

.....

.....

The contract of which this is a note is made between the above-named parties and not by or with any other person, whether disclosed or not, on whose instructions or for whose benefit the same may have been entered into. The rights and liabilities of principals not disclosed on the face of this contract are excluded.

.....

Liverpool, ...1895.

MESSRS. .....

We have carried out your instructions by entering into the contract of which we enclose a note. You will observe that the contract is made between ourselves and Messrs. ..... as principal parties, excluding any other rights or liabilities.

Yours, &c.,

FORM No. 4B

BUYING BROKERS: Rights of Principals excluded.

BOUGHT NOTE.

No.....

Liverpool, ...1895.

To MESSRS. .....

We have this day bought from you:—

1. Quantity and description of Produce.....
2. Price and terms of payment } ..... { Cash (or before delivery if required) less 2½ per cent. discount.
3. Time and manner of delivery .....
4. Special Conditions:—This Contract is subject to the Arbitration Clause and other Conditions of Sale of the Association, whether endorsed hereon or not.

.....

.....

.....

The contract of which this is a note is made between the above-named parties and not by or with any other person, whether disclosed or not, on whose instructions or for whose benefit the same may have been entered into. The rights and liabilities of principals not disclosed on the face of this contract are excluded.

.....

Liverpool, ...1895.

MESSRS. .....

We have carried out your instructions by entering into the contract of which we enclose a note. You will observe that the contract is made between ourselves and Messrs. ..... as principal parties, excluding any other rights or liabilities.

Yours, &c.,

THE LIMITATION OF THE POWERS OF THE LEGISLATIVE COUNCIL IN INDIA.

THROUGHOUT all educated classes of the community in India, Native as well as European, a strong feeling has arisen against the constructive qualifications and limitations which have recently been imposed upon the powers of the Legislative Council in that country. In two notable instances not only has legislation been directed from home, but even precise instructions have been transmitted as to the form which this legislation should assume, if not as to the express words in which it was to be embodied. In the case of the Cotton Duties' Bill, effect has been given to these instructions by enunciating a supposed mandate, which left the Additional Members of Council no option in giving their votes. In the case of the Cantonment Act, a provision, which the public voice with one accord condemned, was happily withdrawn before those members were put to the invidious option of voting for what they disapproved or disobeying the mandate. It is proposed to examine in this paper, whether the qualifications and limitations imposed upon the powers of the Legislative Council can be supported upon constitutional grounds or arguments of policy and expediency. In order to do this it will be necessary first to set forth briefly the origin and constitution of this Council.

The British Parliament is a sovereign legislative body. No court or other authority can question its authority, once it has unmistakably expressed its will and intention in the form of an Act of Parliament. There is not in the British dominions throughout the world any other sovereign legislature. In the colonies and dependencies, those legislatures which exist are non-sovereign. They derive their powers from the British Parliament; and these powers are to be ascertained from the written document or documents, the statute or statutes, which conferred them, and usually defined and limited them. Whatever powers may have been conferred upon, or delegated to, these non-sovereign legislatures, the power of Parliament still remains supreme, and Parliament can still legislate in any manner it pleases for the colony or dependency in which a non-sovereign local legislature has been established.

India, having been acquired by conquest and cession rather than colonization, is usually styled a dependency: and the non-sovereign legislature now existing in this great dependency was constituted

by Act of Parliament, namely the Indian Councils' Act of 1861, since amended by other Acts. Under the constitution given to it by these statutes, the Legislative Council consists of (1) the Governor-General, as President with a casting vote; (2) the Commander-in-Chief, and the Lieutenant-Governor of the Province in which the Council is sitting; (3) the Members of the Governor-General's Executive Council (which forms a sort of Cabinet), usually five; and (4) a number, not less than ten or more than sixteen, of Additional Members, of whom not less than half must be non-officials, or persons not in the service of Government. It was only two years ago, in 1892, that the number of the Additional Members was increased from not less than six or more than twelve as fixed in 1861. In the debate in Parliament upon the amending Act which effected this change, the policy of inviting the non-official classes, Native as well as European, to assist in legislation was approved by all parties. The Act further enabled the Viceroy to make rules under which certain public bodies might select representative men for his appointment; and a further popular tone was given to the Legislative Council by permitting a discussion of the annual financial statement, and by allowing questions to be asked upon executive matters, though no division upon these subjects was permitted.

So much for the *personnel* of the Legislative Council; and now as to its powers. It is authorized to make laws and regulations for *all persons*, whether British or native, foreigners or others; and for *all Courts of Justice* whatever; and for *all places and things* whatever within the territories of India; and for *all servants* of the Government of India—subject, however, to certain restrictions and limitations, which are distinctly set forth. It cannot repeal or alter (1) a certain statute of 1833 (of which hereafter); (2) the statute of 1858, which transferred the Government of India from the Company to the Crown, and invested the Secretary of State for India with the powers of the Court of Directors and of the Commissioners for the affairs of India; (3) three other statutes which have no bearing on the subject with which we deal; (4) Acts of Parliament which enable the Secretary of State to raise money in England; (5) the Mutiny Act; (6) Acts passed by Parliament after the Councils' Act of 1861, and affecting India; (7) anything affecting the authority of Parliament, or unwritten law or custom affecting the allegiance of Her Majesty's subjects.

The Act of Parliament of 1833, which first conferred on the Governor-General in Council legislative powers for the whole of India, contained provisions somewhat similar to those which have just been set forth; and further enacted that nothing therein con-

tained shall extend to affect in any way the right of Parliament to make laws for the territories of India and for all the inhabitants thereof; and it was expressly declared that a full, complete, and constantly existing right and power was intended to be reserved to Parliament to control, supersede, or prevent all proceedings and acts whatsoever of the Governor-General in Council, and to repeal and alter at any time any laws or regulations whatever made by the said Governor-General in Council, and in all respects to legislate for the said territories and all the inhabitants thereof in as full and ample a manner as if that Act of 1833 had never been passed. Such are the essential provisions of the statute of 1833, which the Legislative Council constituted in 1861 may not touch, and by which its powers were expressly restricted. The other provisions as to powers and limitations contained in the statute of 1833 were repealed and, with such additions as the further experience of twenty-eight years had shown to be necessary, re-enacted in the Councils' Act of 1861. This Act contains two more provisions, which must be noticed. *First*: when a law has been passed by the Legislative Council, it has no force until the Governor-General has assented to it; and he can either assent or withhold his assent, or reserve the law for the signification of the pleasure of Her Majesty. *Second*: if the Governor-General assent, he must transmit a copy of the law to the Secretary of State for India, and Her Majesty may through him signify her disallowance, in which event the law is made void and annulled.

The constitutional checks upon rash or imprudent legislation by a majority of the members of the Legislative Council are then these three, viz. (1) the Governor-General withholding assent or reserving the measure for the signification of Her Majesty's pleasure; (2) disallowance by Her Majesty when the Governor-General had assented—in both these cases Her Most Gracious Majesty would of course be advised by Her Majesty's Government; (3) the power of Parliament (that is, of course, Queen, Lords and Commons) to repeal, alter, and enact whatever it pleased.

The scheme so far explained leaves one exigency not provided for. If the Governor-General refuse assent, or reserve, or Her Majesty disallow, there may be no law to govern a state of things which imperatively requires a law. This contingent emergency has not, however, been lost sight of; for the Governor-General is empowered by the Act of 1861, in cases of emergency, to make and promulgate *ordinances* for the peace and good government of the territories of India or any part of them; and such ordinances, unless previously disallowed by Her Majesty, have the force of law for six months. It is unnecessary to say anything here about the

power given to the Governor-General to overrule his Executive Council, our subject being concerned with legislation and not with executive government.

For twelve years after the establishment of the Legislative Council in 1861, it does not appear to have occurred to any one that the previous sanction of the Secretary of State for India was necessary before a proposed measure could be introduced into the Indian Legislature, though there were cases in which contemplated legislation was communicated to this member of the Home Government, and his opinion as to its policy solicited. In some cases, as for example the case of a proposed scheme of general codification, there can be no doubt as to the wisdom and expediency of this course. In 1874 this exceptional practice of seeking counsel and advice was converted into a general rule requiring the previous sanction of the Secretary of State before the introduction by the Indian Government of any measure into the Indian Legislature. In an important despatch of that year the then Secretary of State (the Marquis of Salisbury) adverted to the number and importance of the measures passed by the Governor-General in Legislative Council, and brought for the first time to his official knowledge when transmitted to him under the provision already noticed after receiving the Governor-General's assent. 'I see no sufficient reason,' wrote the Secretary of State, 'why the circumstance, often quite accidental, that your Excellency's orders take a legislative form should deprive me of all official information concerning them until a period at which it becomes peculiarly difficult to deal with them.' The despatch then dwelt upon the inconvenience that might arise from disallowing a whole enactment merely because it contained one objectionable provision, all its other provisions being excellent or unobjectionable; and finally laid down the following general rule for future observance:—

'Whenever the Governor-General in (Executive) Council has affirmed the policy and expediency of a particular measure, and has decided on submitting it to the Council for making laws and regulations, I desire that a despatch may be addressed to me, stating at length the reasons which are thought to justify the step intended to be taken, and the mode in which the intention is to be carried out.' It is then directed that this despatch be accompanied, or immediately followed, by a copy of the bill; and that the date at which it is intended to submit the bill to the Legislative Council be so fixed as to afford the Secretary of State sufficient time to address to the Governor-General such observations as he may deem proper. From this general rule were excepted measures of slight importance and measures urgently requiring speedy enactment;

but in the following year (1875) it was further directed that the Governor-General, when about to deal with any measure under this exception, should without delay telegraph his intention to the Secretary of State.

How this rule of previous approval was converted into the principle of previous sanction, and how this principle of previous sanction was further deemed to warrant the initiation of measures by the Secretary of State, the dictation of the form which these and other measures should assume, and even a direction to the Governor-General that measures so initiated and formulated be passed by the Legislative Council, will appear from the following extract from a speech of the Under-Secretary of State for India (the Hon. Edward Stanhope) in the House of Commons in June, 1879: 'The Governor-General had no option but to pass them' (i. e. the enactments recommended by the Law Commission), 'and the statute, by virtue of which measures were so sent to India to be passed, was still unrepealed. So again, Sir Charles Wood directed the Government of India to pass the bill for the abolition of the Grand Juries of the Presidency Towns, and they had to do it. Of course such a power ought[1] to be recklessly exercised; but that it should exist was only in accordance with common sense. It was not conceivable that the Governor-General should have the power of passing Acts of his own free will in opposition, it might be, to the feeling of Parliament and of the Government of this country, and subject to no controlling influence except that of his recall.'

Now, the Governor-General of India never had power to pass any *Act* of his own free will. He is and always has been subject to the controlling influence of his Council, Executive and Legislative; and the honourable gentleman wholly overlooked the three very efficient checks upon inexpedient legislation provided by the Act of Parliament, as above explained. That there was no one to point this out—no one to tell the Under-Secretary of State for India that the reason of the non-repeal of the statute of which he spoke was, that no such statute ever existed, is gravely suggestive of the danger to which the interests of a vast empire are exposed when dealt with by a distant Legislature in which that empire has no representation.

On the same occasion Sir William Harcourt[2] said that it was important to observe 'that there was one principle admitted by,

[1] *Sic* in Hansard, but probably the monosyllable 'not' was omitted in the speech or the report of it.

[2] It was a motion by him for the production of certain despatches that had passed between the Secretary of State and the Governor-General.

he believed, every Secretary of State, and assented to by Lord Salisbury in 1876, and it was that, as a general and almost unvarying rule, the initiation in Indian measures, and particularly measures of finance, should belong to the Indian Council and the Governor-General in Council; that they should not be dictated from the outside, but that they should come from those who were most likely to be informed about the interests of India. This was necessary for two purposes—to maintain the authority of the Government of India in India, and to maintain the confidence of the people in that Government. In 1874 Lord Salisbury modified the rule by requiring the Government of India to communicate its measures to the Government at home before they were passed [1] and completed; and to that he made no objection, as far as it went; but in 1875 measures were taken which, rightly or wrongly, in the opinions of both the Legislative and Executive Councils, assumed the form of dictation as to the course they were to pursue and the measures they were to pass.' Can the action of the Secretary of State in respect of the Cotton Duties, and the mandate to the members of the Legislative Council, be reconciled with the principles here laid down?

But whence is the doctrine of 'previous sanction' by the Secretary of State derived? There is no express authority for it in any of the Acts in which is contained the written constitution of the Legislative Council. Implied authority is equally wanting, and argument from construction is against it. That the idea of previous sanction was familiar to the minds of those who drafted these Acts is clear. The Act of 1861 expressly requires the previous sanction of Her Majesty, signified by the Secretary of State, for the constitution of a local legislature in any subordinate presidency, division, province, or territory. The same Act requires the previous sanction of the Governor-General for the introduction into the Legislative Council of any measure affecting the public debt, the religious rights and usages of the people, and other matters. The same previous sanction is required for the introduction of various measures into the Local Legislatures; and the Act passed two years ago supplies a further instance of express enactment requiring previous sanction. Can it be contended that the intention so carefully expressed in these cases existed, but was left to be implied, in the most important case of all?

But it may be said that the power reserved to Her Majesty of signifying through the Secretary of State her disallowance of Acts assented to by the Governor-General, involves the power of for-

[1] It will be observed that this should be 'before they were submitted to the Indian legislature.'

bidding the introduction of a measure which, if introduced, passed and assented to, may be disallowed. As reasonably might the Home Secretary intimate to one of Her Majesty's judges that a prisoner accused of some crime need not be tried, because if tried and convicted he would be pardoned. Something of this kind was attempted, when a pardon under the great seal was pleaded on eventful occasions in our own history, and we know how our ancestors dealt with the matter.

In 1875 Lord Salisbury disapproved of the passing of a Tariff Act at Simla, because the Governor-General was thus deprived of the advantages to be derived from the presence of the non-official members in Calcutta. 'In providing,' said he, 'that laws for India should be passed at a Council consisting not only of the Ordinary Members of the Executive Government, but of Additional Members specially added for the purpose (of whom some have always been un-official), it was the clear intention of Parliament that in the task of legislation the Government should, in addition to the sources of information usually open to it, be enlightened by the advice and knowledge of persons possessing other than official experience. Of these you were unfortunately deprived in discussing subjects in respect to which the assistance of mercantile councillors is of especial value. The rapidity of your procedure prevented you from receiving, from external sources and in an informal shape, the counsels which, in consequence of the time and place of legislation, could not be tendered in debate.' It is reasonable to say that the advice tendered to Her Majesty by the Secretary of State to disallow or not disallow a measure passed in India, ought to depend upon a consideration of all the opinions and arguments of those invited to discuss it upon the assumption of their competence to do so based upon special knowledge and experience; and it could never have been intended to give to the Secretary of State, any more than the Governor-General, the power of deciding without hearing where the interests of two hundred millions of Her Majesty's subjects are concerned.

As regards the principle of protection, for example, are those acquainted with the commercial wants of India to be precluded from expressing their views of what is expedient for that country? Great Britain has here adopted a faith of her own, and believing it necessary to salvation she would impose it on others. But the whole world have not accepted this faith. Some of the nations decline to be converted to it. Some of her own children in Australia have accepted and adhere to contrary views. And even in England there are thinking men, whose opinions are not the less valuable because they are free from the bias of self-interest, who

doubt the wisdom of a rule that has no exceptions, and are unable to assent to the soundness of a policy which has gone far to destroy our home agricultural industry, and might in a few days inflict starvation upon the million inhabitants of London, if our navy lost command of the sea. Even assuming that protective duties are bad, there may be other forms of taxation much worse under the particular circumstances; and why should India be denied the option of evils, which is permitted to Australia?

It has been supposed that an argument in support of the doctrines of previous sanction and legislative vote by mandate may be derived from the relations which, in the time of the Company, existed between the Governor-General and his Council on the one part, and the Court of Directors and the Board of Commissioners on the other part. By the Regulating Act of 1773 (13 Geo. III. c. 63, s. 9), it is enacted that the Governor-General and Council shall, and they are hereby directed and required to, pay due obedience to all such orders as they shall receive from the Court of Directors. There was then no formal legislative body in India; but a subsequent section of the same statute empowered the Governor-General and Council to make and issue rules, ordinances, and regulations for the good order and civil government of the country, and to impose reasonable fines and forfeitures for the breach of them. Possibly the Court of Directors might then have ordered the Governor-General and Council to make and issue any particular rule, ordinance, or regulation; and the order would have been obeyed, although it may be doubtful if the provision as to *due obedience* in the earlier section, which is apparently concerned with executive matters, governs the later section, which is concerned with rules, ordinances, and regulations. It may be observed that the term 'laws' is not here used; and it was not till 1833, when the Governor-General in Council was empowered to legislate for the whole of India, that the laws and regulations so made were declared to have the force and effect of Acts of Parliament (3 & 4 Will. IV. c. 85, s. 45).

In 1833, by the statute last mentioned, the Board of Commissioners for the affairs of India was constituted and given full power and authority to superintend, direct, and control all acts, operations, and concerns of the Company. In 1858, when the Government of India was transferred to the Crown, the Secretary of State for India was vested with all the powers of the East India Company or Court of Directors or Court of Proprietors, which could then be exercised by the direction or with the sanction or approbation of the Board of Commissioners.

The argument then stands thus:—Parliament is supreme, sovereign.

Parliament in 1773 enacted due obedience, and this enactment remains unrepealed to this hour. The obedience which in 1773 was to be rendered to the Court of Directors is now to be given to the Secretary of State for India, and that obedience is exigible equally in matters executive and legislative. To this argument it is submitted that it is a sufficient answer to say that the provision as to due obedience in the statute of 1783 cannot be made applicable to the legislative status created in 1833, or to that created in 1861, neither of which could possibly have been within the intention of that statute: that the language and construction of the statute of 1861 (it is unnecessary to consider further that of 1833) show that it was then intended by Parliament to confer full legislative functions (except where otherwise expressly provided) upon the Legislature then constituted for India: and as these full powers were conferred upon this Legislature and its members by the same supreme Parliament, which enacted the rule of due obedience in 1773, nothing duly done in the exercise of these powers can be a violation of a rule which has not been expressly made applicable, and upon reasonable principles of construction is not impliedly applicable to legislative functions. No doubt the Secretary of State may, under the rule of due obedience, forbid or direct the Governor-General in Executive Council to introduce any measure into the Legislative Council; but he cannot direct the Legislative Council to pass a measure so introduced; and even where the introduction of a measure has been forbidden to the Governor-General, any Additional Member may move to introduce it, unless it come within the exceptions requiring special previous sanction.

That it was intended to give full legislative powers to the Council created in 1861, appears not only from the language of the statute itself, but from the whole debate. Sir Charles Wood, who introduced the bill, expressly said that it altered the means and manner of legislation for India; and that in the then state of public feeling in that country it was quite impossible to revert to the state of things in which the Executive Government did the work of legislation. The pages of Hansard show that in both Houses the idea of making the Council a consultative or deliberative body was rejected; and that, in accordance with the recommendation of Lord Canning, it was to have full and independent legislative functions. It has been assumed that the Secretary of State, governing himself by a resolution of the House of Commons, may require the Legislative Council in India to legislate according to such resolution, and that it is incumbent upon the members of the Council to comply with this mandate. If this be a sound constitutional doctrine, a curious result will

follow. Parliament, that is, Queen, Lords and Commons, in 1861 empowered the Legislative Council of India to make laws for all persons, all courts, all places, all things in India, with certain express exceptions; but the House of Commons alone, in respect of any matter, if without the exceptions, can forbid, and if within the exceptions, can direct, legislation. In other words, one House can set aside an Act passed by Parliament. No doubt Parliament can, if it please, pass any measure for India. But this would enable the House of Commons alone to do so. Is this constitutional?

The power of Parliament is, as has been already stated, supreme, sovereign—in theory at least, for its exercise will always be governed by policy. In 1765 Parliament asserted its power to tax the American Colonies even without representation, and passed an Act declaring that power. Just twelve years after, in 1777–8, 'taxation by the Parliament of Great Britain for the purpose of raising a revenue' having 'been found to occasion great uneasiness and disorders,' it was 'enacted that after this Act' (i. e. of 1777–8) 'the King and Parliament of Great Britain will not impose any duty, tax or assessment whatever, except only such duties as it may be expedient to impose for the regulation of commerce.' Taught by the experience of the past, Parliament, at least, we think, while the House of Lords forms part of the constitution, will assuredly never again tax a colony or dependency and raise the question of taxation without representation; but if the doctrine of legislation for India by resolution and mandate is sound and constitutional, any House of Commons by resolution, and any Secretary of State by despatch, may direct the passing of a Taxation Act, and stir up a grave political question. The action recently taken and the doctrines recently enunciated have created dissatisfaction and uneasiness, which have for the time been allayed by the wisdom of Mr. Fowler, the present Secretary of State for India; and by the noble policy of the House of Commons upon Sir Henry James's motion: but if there can be any doubt as to the powers and independence of the Indian Legislature, it were well that this doubt be removed before its existence create fresh complications, the consequences of which may not be removable by the mere provisions of a Declaratory Act.

C. D. Field.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Traité théorique et pratique de droit international privé. Par ANDRÉ WEISS. Vols. I and II. Paris: L. Larose. 1894. 8vo.

MR. WEISS, who is a Professor of the Paris Law Faculty, is already known as the author of an excellent elementary book on Private International Law in one volume. The present is a much more exhaustive treatise.

The first of the present volumes is devoted to Nationality, and the second to what the author calls 'le droit de l'étranger.'

The volume on Nationality contains a detailed examination of the law of France, with a synopsis of the laws of other countries and a short historical introduction. The commentary is in the orthodox style of French law-books, that is, giving the author's construction and views rather than those laid down in judicial decisions. This is of course due to the fact that precedents have no binding authority in the French Courts. The test of a good French law-book, in fact, is the closeness of the author's own judicial reasoning. In this respect the book bears careful scrutiny, though on some points we fancy we notice weakness. Thus in the discussion of the new enactments we observe the following passage:

'Les lois de 1851 et de 1874 n'avaient pas réalisé les espérances de leurs promoteurs. La faculté d'option réservée aux individus que ces textes déclaraient Français au jour et par le fait de leur naissance, était pour eux un moyen commode de se dérober aux charges auxquelles tous les Français sont astreints; et ils ne faisaient pas faute d'en user, conservant ainsi dans notre pays, dont ils avaient pris les habitudes et les mœurs, dont ils parlaient la langue, une nationalité étrangère et une situation privilégiée.' (Vol. I. p. 197.)

Has not Mr. Weiss here departed from his habitual accuracy of reasoning? To be excluded from all public functions, from all government of a country, though bearing equally with citizens all taxation, does not seem a privileged position. We should rather say the opposite. The author alludes of course to the 'military service' which is obligatory upon Frenchmen. But he omits to mention that military service is the correlative obligation of a great variety of privileges possessed by Frenchmen in their own country. Foreigners are excluded, as we have said, from all public employment, even from teaching in the public schools, from the public factories, from tenders for state contracts, and, in fact, from everything which it is possible to reserve for Frenchmen. This is only proper, but it misleads the unwary to talk of the privileged position of foreigners in France, and we are surprised at such an observation from so large-minded a writer as Mr. Weiss.

Mr. Weiss is also not quite accurate in his account of English law. Thus the sense of the third paragraph of Section 7 of the Act of 1870, upon which he bases an argument, is quite misunderstood in the following translation:

'L'étranger qui aura obtenu la naturalisation jouira des mêmes droits, politiques ou autres, que le citoyen d'origine, pourvu toutefois qu'il soit

considéré comme sujet britannique dans sa patrie d'origine, s'il vient à y séjourner.' (Vol. I. p. 28.)

In spite of a few such inaccuracies of fact and reasoning, however, the book deserves consideration, if only for its size and the evident pains at which the author has been to embrace in it everything which could be serviceable for the practitioner.

In the second volume the author follows the same distribution of his subject as in the first. Among the subjects dealt with are property generally and copyright, patents, trade marks, trade names in particular. The public status of foreigners and foreign companies also forms part of this volume. A useful appendix contains the chief international treaties relating to the position of foreigners in France and of Frenchmen abroad. Other volumes are to follow.

T. B.

A Treatise on the Doctrine of Res Judicata, including the Doctrines of Jurisdiction, Bar by Suit, and Lis Pendens. By HUKM CHAND. London: William Clowes & Sons, Lim. 1894. Large 8vo. xx, 61 and 764 pp.

THIS is a remarkable book. It is published in London; it was printed in Bombay; it was written at Delhi; and it is dedicated to Lord Herschell. The author is a Master of Arts, but we are not told of what University. Presumably he is a lawyer, but whether he is a judge or an advocate we are also not informed.

It is a stupendous book. It contains 764 pages with 38 closely printed pages of Addenda. The author claims that he has referred in the text to four thousand cases, and to all the American and English text-books on the subject. He also makes copious references to French authors and to writers on the Civil Law. As far as can be gathered from a cursory inspection Mr. Hukm Chand seems to have really done all that he claims to have done. He tells us that he has had 'to rely entirely on the unaided resources of his own private library.' It is almost impossible, therefore, that all his quotations are made directly from the authors whom he quotes, but still his authorities seem, all of them, to have been carefully selected and judiciously compared.

Mr. Hukm Chand writes excellent English. He rarely makes a slip; and his language is clear. He must also have a good knowledge of Latin and French.

As to the actual merits of Mr. Hukm Chand's book it would be difficult, without a very lengthy examination, to offer an opinion. But the book impresses one favourably: his quotations are apt; his arrangement is good; and his own remarks are sensible. Still one cannot help asking, of what use is such a book likely to be? Mr. Hukm Chand hopes that his book will not fail to be useful in any country, and that it will be specially useful to Indian lawyers. I am inclined to think that the first of these hopes is more likely to be realized than the second. Probably any experienced lawyer, with good libraries at hand, might use the book with advantage. On any critical point he would, of course, follow up the abundant references given, and test the authorities for himself. But the vast majority of Indian lawyers have no libraries to refer to; and (it is no disparagement to them to say) a discussion in which French and Latin quotations, English, Indian, and American authorities are mixed up together would only bewilder them. They had better take the language of the Civil Procedure Code as their guide, and trust to the light of nature to interpret it rightly.

W. M.

Des contrats par correspondance. Par JULES VALÉRY. Paris: Thorin et Fils. 1895. 8vo. 461 pp. (*8fr. 50.*)

M. JULES VALÉRY has produced a learned and elaborate monograph, including much more consideration of foreign laws and literature than has been usual in French books. His theory of contracts by correspondence is like that of the latest English authorities, but goes a step farther, for he holds the contract to be concluded by any overt act of acceptance. Also he applies the same rule to the revocation of offers, and avoids inconvenient consequences by maintaining an independent right of the addressee to damages for untimely revocation. It appears that the French Court of Cassation has taken refuge from some of the difficulties by treating the question at what place a contract was concluded as a question of pure fact. M. Valéry justly points out that this is unsatisfactory.

As M. Valéry has taken the trouble to use English books, and use them in the main very well, we do not understand why he seems not to care whether he quotes a recent or an obsolete edition. Surely it is understood in France as well as in England that citing an old edition of a law-book, except for the strictly historical purpose of showing what doctrines were approved or current at a certain date, is neither just to the author nor safe for the reader.

F. P.

A Collection of Statutes relating to Criminal Law. Reprinted from the Fifth Edition (by J. M. LELY) of Chitty's *Statutes of Practical Utility*. With an Introduction and Index. By W. F. CRAIES. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1894. La. 8vo. xxxvi and 429 pp.

MR. CRAIES, in his preface to this collection of Criminal Statutes, expresses the hope that it 'will be found useful as a supplement to Archbold and Roscoe.' The teaching of some practical experience is that as a supplement to Stephen's Digest it enables the possessor of both to do without Archbold and Roscoe altogether. Each of those excellent works contains, in one place and another, the bulk of the criminal statutes, and when Mr. Craies's book is used as a supplement to either of them, the possessor has under his hand, if he knows where to look for it, most of Mr. Craies's information twice over. The Digest, however, is really as well as ostensibly a digest and not a dictionary, and does not profess to set out sections of statutes, but only to give their effect in the most condensed form. This, therefore, and the Criminal Statutes seem to be the true complements, or supplements, of each other. In our opinion, since the appearance of the Digest, no equally useful book on criminal law has been published, and with the exception of one serious error, to be mentioned presently, and one or two omissions, which, though to be regretted from the practitioner's point of view, were the natural consequence of the scheme of Chitty's collection, we have nothing for it but the warmest praise. Whatever text-book may be used, reference to the statutes themselves is frequently indispensable, and they could not be presented in a more convenient or portable form than this. The index appears, after continuous use for several weeks, to be thoroughly good. The volume includes the Prevention of Cruelty to Children Act, 1894, and 'the relevant portion of' the Merchant Shipping Act, 1894, both of which were passed too late for insertion in the current edition of Chitty. It does not contain the Corrupt Practices Acts, or any part of them, these being

classified in Chitty under the heading 'Parliament.' The notes appear as in Chitty, and are therefore the work of Mr. Lely and his predecessors, Mr. Craies supplying the index and one introduction, the tables of cases and of statutes, and about three pages of corrections of text and notes, entitled 'Addenda to Notes.' Some of these last are rather important, and their incorporation will improve future editions. The introduction contains a succinct and accurate account of the recent development of the law.

The error to which we have referred concerns the effect of the Penal Servitude Act, 1891. It occurs in a note and pervades the text, and Mr. Lely is therefore primarily responsible for it, but we rather wonder that it has passed Mr. Craies's scrutiny. Sect. 4 of the Larceny Act, and a considerable number of other sections, are made to provide a maximum penalty of three years' penal servitude for 'simple larceny' and other offences. In a note to the section so stated (p. 221 (s)) Mr. Lely says: 'This "three" was altered to "five" by the Penal Servitude Act, 1864 . . . but the "five" was altered back to "three" by s. 1 of the Penal Servitude Act, 1891.' The facts are these. By the Consolidation Acts the punishment for simple larceny, unlawful wounding, and some other offences of importance was enacted to be three years' penal servitude or imprisonment. The Penal Servitude Act, 1864 (27 & 28 Vict. c. 47, s. 2), enacted that 'no person shall be sentenced to penal servitude in respect to any offence committed after the passing of this Act for a period of less than five years, and where under any Act now in force a period of less than five years is the utmost sentence of penal servitude that can be awarded, a period of five years shall, in respect of any offence committed after the passing of this Act, *in such Act* be substituted for the less period.' This section is repealed by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, s. 1, subs. (3)). According to Mr. Lely and Mr. Craies the effect of this repeal was to revive the minimum sentences of three years enacted previously to 1864. The editors of Stephen's Digest (5th ed., p. 1, n. 1) differ from them, and so does the editor of Archbold (21st ed., p. 198), and so does the practice of the judges, so that we should have expected a less confident statement. In our judgment it may properly be argued that the result of the words 'in such Act,' italicized in the above extract from the Act of 1864, is to amend all the previous Acts, for if not what do the italicized words mean? And if the previous Acts were amended it seems that the amendments would survive the repeal of the amending Act, on the principle on which repeals survive the repeal of the repealing Act. But it is unnecessary to rely on so circuitous an argument. As the editor of Archbold points out, the first section of the Penal Servitude Act, 1894, itself, in the first sub-section, enacts 'where, under any enactment in force when this section comes into operation, a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, *and not exceeding either five years or any greater period authorized by the enactment.*' The intention by this sub-section to abolish certain *minimum* sentences was notorious, and the passage here italicized may have been overlooked, but the contention that this Act can 'alter back' the lowest *maximum* of penal servitude from five years to three is surely not tenable.

Saving this error, which might conceivably lead to serious misunderstanding, the book is admirable. It has already been found exceedingly useful, and few of the persons constantly engaged in the administration of the criminal law will be able to afford to do without it.

Judicial Statistics: Part I—*Criminal Statistics.* Edited by C. E. Troup. Prefixed by a Report of a Departmental Committee. The Stationery Office. 1895. 4to. 250 pp. (3*s.* 8*d.*)

It has long been admitted by all persons familiar with the subject that the statistics of crime annually published by the Home Office were in want of a complete revision, which they have now more or less received at the hands of a Departmental Committee. The duty of the editor acting under general instructions from the Committee has been twofold: he has in the first place to decide what information he is to give, and in the second how to give it. Taking the less difficult task first, we have no hesitation in saying that the form of the new statistics reflects credit on every one concerned. The tables containing the necessary figures are printed clearly and with the smallest possible variation between their respective appearances, which greatly facilitates comparison between them. The nature of each table is suitably indicated at the top of the page, they are all arranged (there are fifty-eight of them altogether) on a simple and intelligible plan, and there is a capital index. Individually most of these matters are trifles, but collectively they make all the difference between one who is not an expert being able or not to use such works as the present. How far the subjects of the statistics have been wisely chosen, or rather how far the principles on which the choice has been made are sound, is a more difficult question. It must be remembered that the Committee have had their hands tied to some extent by the existence of previous statistics with which it will in future be desirable to make comparisons; the breach between the old and the new series must not be too abrupt, and this accounts in some degree for the inclusion of as many as nineteen indictable offences out of a total of eighty-two in a class of miscellaneous offences, and the contents of some of the tables. The tables omitted relate chiefly to prisons and certain expenses, which no doubt are more aptly inserted in a different publication. The new comparative tables, that is, tables giving a synoptical view of similar figures during the last ten years, leave nothing to be complained of, though we should like to see a comparative table of the proportion of acquittals to convictions. We have a table containing the numbers of indictable offences committed, and another showing the number of trials for each offence, and thanks to judicious printing the two are easily compared; but we do not find any list of the number of non-indictable offences committed, but only one of the number of apprehensions made in respect of them. The difficulties of tabulating figures as to previous convictions are very great, and are fully noticed in the Introduction. We are glad to see in the Report that the construction of a comparative table on the subject is contemplated, and we hope it may be found possible to construct a table showing what previous offences persons convicted of various crimes have been convicted of. Meanwhile we do not see much value in Table XXXV, and place very little reliance on Table XXVI giving the number of suspected persons at large. Mr. Troup, in our judgment, shows a wise discretion in taking indictable offences committed as a test of criminality, and we quite concur in the reasons he gives for this step. It is also plain that he is aware of the pitfalls in his way provided by the Summary Jurisdiction Acts and other alterations of the law. We could wish that the authors of the Report had shown an even greater reluctance than they have to enter into a consideration of the 'personal condition' of offenders. It is easy to ascertain their sex and their approximate age, but the degree of their education, their domicile, and their occupation are a good deal more difficult to judge of, especially when

we consider how the judging must necessarily be done. We hope, at least, that these subjects will form the ultimate boundary of the scope of official inquiry, and that the recommendation of a distinguished outsider to inquire into their diseases and 'signs of degeneration' will be resolutely avoided. The diagrams now provided for the first time are useful for persons who do not care to look at figures, but we fear that the maps showing the distribution of crime among the counties are subject to too many qualifications to make them of much real value.

Prideaux's Precedents in Conveyancing, with Dissertations on its law and practice. Sixteenth Edition. By JOHN WHITCOMBE and BETHUNE HORSBRUGH. London: Stevens & Sons, Lim. 1895. Vol. I, l and 872 pp. Vol. II, xlvii and 895 pp. (£3 10s.)

THE great popularity of this book is proved by the short time (two years) that has elapsed since the publication of the last edition. This popularity arises in part from the manner in which the precedents are arranged. A clerk who has but small legal knowledge can frame a draft correctly, if indeed the draft is to follow closely any of the precedents contained in this book, with only a moderate amount of supervision from his principal. The present edition is brought out by Mr. Whitcombe in conjunction with Mr. Bethune Horsbrugh. The provisions of the Trustee Act, 1893, the Copyhold Act, 1894, the Voluntary Conveyances Act, 1893, the Married Women's Property Act, 1893, have, so far as they affect the Law and Practice of Conveyancing, been incorporated in this edition.

The very useful account of the death duties which appeared in the last edition has been brought up to date, and the provisions of the Finance Act, 1894, so far as they relate to the death duties, are set out in an intelligible form. It would not be possible without a very laborious and minute examination of this book to detect all the new matter in it. We may however point out that the precedent at Vol. II, p. 455, 'Conveyance of land as a site for a building to be used for parish purposes in connexion with the Church of England,' is new. We think that it will be found very useful, not only because the provisions contained in it are likely to work smoothly, but also because a person who uses it will avoid falling into errors commonly committed by ignorant draftsmen who undertake to prepare trust deeds for parish rooms. (See as to this the case and opinion printed in the *Guardian* Newspaper of Feb. 7, 1894, p. 231.)

The Merchant Shipping Act, 1894. By ROBERT TEMPERLEY. London: Stevens & Sons. 1895. La. 8vo. lxxx and 719 pp. (25s.)

THIS is the fourth book on the Merchant Shipping Act, 1894, that has come to us for review—the fourth, the last, and the most complete. Mr. Temperley has given himself more time to work on the Act than his competitors, and the result is a full, complete, and most satisfactory work. To begin with, the table of cases is of respectable length, and contains some 600 cases. Over 100 statutes are noticed as not being dealt with by the Consolidation Act. A full table showing the corresponding sections of the existing and repealed Acts follows. The Introduction calls attention to certain undoubted changes in the law effected by the new Act; and the reader is prudently warned that 'it is impossible either for the draughtsman or the editor in every case (of changes in wording of the new Act) to foresee

their full effect.' No doubt we shall soon hear more of the alterations in the law effected by the so-called Consolidation Act of 1894. Only the other day an important and difficult question arose upon s. 547 with reference to the costs of a salvage action in consequence of the new wording of the existing statute.

The notes mainly deal with cases illustrating the effect of the various sections of the Act. In some cases they are of considerable length; for example, s. 34, dealing with the rights and liabilities of a ship mortgagee, itself only a few lines in length, is followed by two pages of closely printed notes. So, also, the notes on the 'compulsory pilotage' sections are of considerable length, and set out as concisely as possible the effect of the numerous cases upon that thorny subject. Perhaps some of these are too concise. For an instance of this we may refer to the notes on *The Guy Mannering* and *General Steam Navigation Company* v. *British and Colonial Steam Navigation Co.*, which are scarcely consistent as statements of the law with regard to the shipowner's liability for damage done by his ship when in charge of a pilot. The distinctions in such cases are so extremely fine that it is almost impossible to state the effect of the decisions in general language. Cases of the current year are noted (see p. 314); and some cases not to be found in any text-book are cited (cf. *Burrell* v. *Macrayne*, p. 331). One slip only we note: *The Hankow* is not to be found on p. 576.

On the whole, Mr. Temperley's book is the nearest approach to the sort of work on the Merchant Shipping Act which on a former occasion we mentioned as never having hitherto been supplied. We think it will take a leading position in the literature on the subject. It is a goodly volume; but the Admiralty foul anchor embossed upon the cover does not quite faithfully reproduce the well-known emblem in Probate, Divorce, and Admiralty Court, II.

A Concise Treatise on the Law of Wills. By H. S. Theobald. Fourth Edition. London: Stevens & Sons, Lim. 1895. La. 8vo. cxxxv and 787 pp. (30*s.*)

The steady growth of the table of cases and of the text in each successive edition of this well-known work shows that there is no diminution in the flow of reported cases on Wills. Of some eighty additional pages of text in this edition about thirty are occupied by a new chapter on tenant for life and remainderman. This new edition will fully maintain the reputation of the book as a concise and convenient work of reference, supplying at once a condensed and trustworthy digest of the law of Wills, and a finger-post to every authority which need be consulted. An examination of the text in search of a considerable number of recent cases has disclosed no single omission. Exception may be taken to the statement in the Preface that the rule against perpetuities applies to legal remainders, since the decision to which the author presumably refers (*Frost* v. *Frost*, 43 Ch. Div. 246) may rest firmly on another and independent rule recognized in *Whitby* v. *Mitchell* (44 Ch. Div. 85). But this is not the place to enter further into that difficult question, of which we shall hear a great deal more before the rule against perpetuities can safely claim any such extension as is here suggested.

A Manual of Public International Law. By THOMAS ALFRED WALKER. Cambridge: At the University Press. 1895. 8vo. xxviii and 244 pp. (9*s.*)

A COUPLE of years ago Dr. Walker published an interesting and suggestive, though perhaps somewhat hastily composed treatise upon 'The Science of International Law[1].' He has now compressed his materials, evidently after careful revision, into a manual, or 'Grundriss,' primarily intended for the use of students. The work is divided into four Parts, devoted respectively to an Introduction, to the law of 'normal relations,' as the author chooses to describe the law of Nations in time of peace, and to what he considers to be the 'abnormal relations' of War and Neutrality. Through all these 'Parts' there runs a continuous series of numbered propositions in black type, which, if printed by themselves, would form something like a code of International Law; but each of them is explained at some length, and illustrated by brief references to diplomatic discussions and judicial decisions. Every help is provided for rapidly finding one's way about the book, by means of marginal notes, indices, and an analytical table of contents. The execution of the work, considering how wide a field had to be surveyed, leaves little to be desired. The language employed is not always free from ambiguity, e.g. the definition of International Law as 'the code of states and communities to which has been accorded recognition of belligerency,' p. 3; and here and there one meets with statements which are not quite satisfactory, e.g. with reference to 'intervention,' p. 25; to 'spheres of influence,' p. 30; to 'notification,' p. 32; to 'ratification,' p. 84. But the work as a whole possesses great merits. Its arrangement marks the considerable progress which has been made in realizing the relations one to another of the different topics of the science since, say, the publication of Wheaton's 'Elements,' in 1836. It is not disfigured by any allusion to so-called 'Private International Law'; and it is enriched throughout by references which testify to the author's wide acquaintance, not only with the relevant older literature, but also with recent Parliamentary papers, American as well as English, as also with the tendencies of contemporary opinion, as traceable in the transactions of the Institute of International Law, and in the foreign Reviews specifically devoted to the subject of which he has so successfully indicated the salient features.

Private International Law. By Sir WILLIAM HENRY RATTIGAN. London: Stevens & Sons, Lim. 1895. 8vo. xv and 267 pp. (10*s.* 6*d.*)

IN British India, which is said to border on the territories of nearly seven hundred independent native States, the importance of Private International Law is doubtless undeniable; and, although we may not agree in thinking that even for Englishmen 'such treatises as those of Westlake and Foote are hardly adapted for a College course,' it is quite possible that no work has hitherto appeared which exactly suits the requirements of Indian students of the subject. Such at any rate is the opinion of Sir William Rattigan; and the present work is intended to supply what is wanted. It is in many respects likely to answer its purpose. Its seven chapters deal respectively with the growth and general theory of the science: nationality and domicil; status and family law; the law of things; the law of obligations; 'immaterial rights;' procedure and foreign judgments. The treatment of the several subdivisions of the subject testifies to the wide

[1] See LAW QUARTERLY REVIEW, vol. ix. p. 383.

reading and good sense of the writer, though one may doubt whether the chapter on copyright, patents, and trademarks would not have been better omitted, and one feels throughout that the question of jurisdiction is insufficiently distinguished from that of the choice of law. The language employed occasionally leaves something to be desired, as where we read that 'no such comity exists and never will exist'; and one meets with such phrases as 'burghal-community'; 'action,' instead of 'act'; 'placeat,' instead of 'placaat.' There is a reference to the repealed statute 4 Geo. IV. c. 91, but no mention of the Foreign Marriage Act, 1892. The least satisfactory portion of the book is to be found in its opening paragraphs, which might lead one to suppose that the function of Private International Law is to regulate 'the jural relations between citizens and foreigners.' Sir William Rattigan knows better; for he had just quoted von Bar's definition of the science as that which 'determines the applicability of the legal systems and the jurisdiction of the agencies of different States in private legal relations.' The historical sketch which follows is clear and able; and, as might be expected, the book contains, here and there, interesting information upon the legislation of British India, e.g. as to the proceedings which may be taken under the Code of Civil Procedure by and against native princes and their envoys. There is also a full account of the important recent decision of the Privy Council in the case of *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* ('94, A. C. 670).

The Law and Practice of Rating. By Edward James Castle, Q.C. Third Edition. London: Stevens & Sons, Lim. 1895. 8vo. xlvii and 655 pp. (25*s.*)

Mr. Castle has not displayed such care in preparing his third edition as the excellence of his earlier work leads one to expect of him. In conciseness and lucidity the book leaves little to be desired, but it is by no means free from mistakes. At page 43, section 430 of the Merchant Shipping Act, 1854, is set out at length, though it was repealed nine months before the publication of this work and re-enacted in somewhat different language in the Act of 1894. And even the repealed section is not quoted correctly, a superfluous 'not' having crept in, whereby the effect of the enactment is grievously misrepresented. On the same page the Lunatic Asylums Act, 1853, is quoted, and no reference is made to the Lunacy Act, 1890, by which the earlier Act was repealed and quite different provisions were substituted. On page 88 the result of *West Ham* v. *London County Council* is incorrectly stated. The true ground of distinction is between underground and overground sewers, not between those that do and those that do not 'occupy public property.'

Mr. Castle has added some useful chapters on procedure, but these are not quite up to date. Thus though he quotes s. 6 (1) of the Local Government Act, 1894, no pains have been taken to show in detail what duties of overseers are thereby transferred to Parish Councils. For instance, at page 536 it is said that the overseers may, with the consent of the vestry, appeal against the valuation list. This is no longer the case in rural parishes. The Parish Council appeals, and the consent of the vestry is no longer required. *Clark* v. *Fisherton Anger* is treated as an authority that the costs of an appeal from sessions are in the discretion of the Court, and no reference is made to *London County Council* v. *West Ham* in the Court of Appeal ([1892] 2 Q. B. 173), which appears to overrule that case, and

establishes that when the order of sessions is quashed the High Court has no jurisdiction to allow costs. *Rex* v. *Shropshire* is quoted as deciding that 'fourteen clear days' notice' means fourteen days *including* both the day of the notice and the day on which the sessions meet. In fact it decides exactly the contrary, viz. that the fourteen days must be reckoned *exclusively* of those days.

We would suggest to Mr. Castle that it would be convenient to quote cases by their names instead of by fancy titles, such as 'the London Sewers cases,' 'the Kensington Stores case,' and to use the recognized citations of the Law Reports, rather than the clumsier ones adopted by him, such as 'L. R. 17 Q. B. D.,' 'L. R. (1891) 2 Q. B.,' 'L. R. (1894) App. Cas.' The addition of 'L. R.' to citations of later date than the Judicature Acts is worse than superfluous; it might easily give rise to confusion.

The Principles of Rating. By EDWARD BOYLE and G. HUMPHREYS-DAVIES. Second Edition. London: William Clowes & Sons, Lim. 1895. La. 8vo. xxiv and 1163 pp. (25*s.*)

To a lawyer who had not an edition of the Statutes or Fisher's Digest this book would be of great use. The appendix contains most of the statutes that relate to rating, together with some that do not, and two sections of a repealed Act, viz. ss. 389 and 430 of the Merchant Shipping Act, 1854. The corresponding sections of the Merchant Shipping Act, 1894, are not given. There is also a digest of cases for which the authors acknowledge their indebtedness to Fisher. The headnotes of cases taken from the Law Reports appear to be faithfully copied, even when they fail to give the whole effect of the decision. Thus in the case of *West Ham* v. *London County Council* ([1893] A. C. 562), the headnote does not draw attention to the distinction made between underground and overground sewers. Messrs. Boyle and Humphreys-Davies accordingly fail to notice the distinction in their digest though they discuss it in the text (p. 71). Even there, however, though they quote Lord Herschell's reasons at length, they fail to appreciate the generality of the distinction, and seem to find difficulty in reconciling it with the well-established principle that there can be no prescription for an exemption from rateability. Lord Herschell's ground for upholding the exemption of underground sewers is that he considered it inexpedient for the House of Lords to disturb the law as interpreted by a long course of decisions. There was no suggestion of a prescriptive exemption, nor need it be supposed that 'the Court [*sic*] thought that it was necessary to make special exception of the particular property, as under the peculiar circumstances least injustice would be done.'

The book might be improved by severe compression. The style is very diffuse, and the practice of setting out judgments at length instead of giving the effect of the decision on the law has been indulged in without stint.

There is too a good deal of repetition and a want of orderly method. Who, for instance, would look in the chapter on 'Procedure in the Metropolis' for the changes introduced in rural parishes by the Local Government Act, 1894? In writing the chapter on 'Procedure outside the Metropolitan Area' the authors seem to have forgotten this Act, and do not mention that in rural parishes appeals against the valuation list are now brought by Parish Councils instead of by overseers, and the vestry can no longer order owners to be rated instead of occupiers under 32 & 33 Vict. c. 41, s. 4.

The Law of Copyright in Designs, together with the Practice relating to Proceedings in the Courts and in the Patent Office. By LEWIS EDMUNDS; assisted by T. M. STEVENS and MARCUS V. SLADE. London: Sweet & Maxwell, Lim. 1895. 8vo. xviii and 291 pp.

SINCE the great development of legislation and commerce in property in designs no separate work has dealt with this matter. This omission the authors endeavour to supply, and with considerable success. The work is well written and well printed, and contains all that is necessary for the legal or trading communities. The important questions connected with novelty and publication obtain adequate treatment, while careful consideration is given to the difficult problem, 'What is a design?' On this point, however, we should have expected some reference to the discussion in the House of Lords on the kindred question, 'What is the design of a picture?' to be found in *Hanfstaengl* v. *Baines*, '95, A. C. 20, decided in December, 1894. However, the book is a good and honest one.

The Law of Compensation. By EYRE LLOYD. Sixth Edition, by W. J. BROOKS. London: Stevens & Haynes. 1895. 8vo. xlv and 496 pp.

MR. BROOKS, who assisted Mr. Lloyd in the preparation of the fifth edition in 1882, appears to be solely responsible for this edition. The editor has re-written some chapters, and has succeeded in incorporating the many cases decided since 1882, without increasing the size of the book. Indeed the number of pages is fifty-seven less than that of the fifth edition. On this the editor is to be heartily congratulated. A common way of preparing a new edition is to leave untouched the old matter and merely sandwich in the new as best may be, with the result that many originally good books become unreadable after the first few editions. Among the wholly new matters we find the editor has dealt with compensation under the Housing of the Working Classes Act, 1890, but we fail to understand why he has not given a chapter to the important and somewhat novel provisions for compensation for land taken under the Allotments Act, 1887, and the Local Government Act, 1894. It seems probable that there will be a large number of arbitrations under these enactments, and some guidance as to their interpretation by the light of cases decided on earlier Acts would have been invaluable. We wonder what the lay arbitrator will make of the provision in s. 9 (11) of the Act of 1894, that except in the prescribed cases he shall not hear 'counsel or expert witnesses.' The phrase 'expert witness' is, we believe, new to statute law, though it has been used pretty generally by the judges since 1854, when it made its first appearance in the reports in the case of *Eads* v. *Williams* (4 De G. M. & G. 674). There is however still room for discussion as to the precise meaning to be attached to the term.

It may be that the editor would plead as his excuse for omitting these Acts that many of the provisions of the Lands Clauses Acts are incorporated subject to adaptations to be prescribed by the Local Government Board, and that the Board has not yet prescribed any adaptations. If this be his reason, the difficulty illustrates the inconvenience of the modern method of legislating in general terms, leaving the details to be filled in, and from time to time varied, by a Government Department.

Generally speaking, the editor seems to have done his work thoroughly

well, and to have produced an excellent edition of a book whose merits are too well known to require further comment.

Contempt of Court, Committal and Attachment and Arrest upon Civil Process in the Supreme Court of Judicature, with the Practice and Forms. By JAMES FRANCIS OSWALD, Q.C. Second Edition. London: William Clowes & Sons, Lim. 1895. 8vo. xxxvi and 295 pp. (12*s.* 6*d.*)

MR. OSWALD'S book upon Contempt of Court, which met with so favourable a reception on its first appearance some three years ago, has already run into a second edition. Its popularity was assured from the first, for the work was practically the only accessible one on the subject, and was written by one who was well versed in its theoretical and practical aspects. Little can be usefully added to the remarks already made upon this book, which unites considerable learning and research with a light and pleasant style. The present volume, while in the main preserving the same features as the last, has been partly rearranged with regard to its chapters, while the various suggestions and proposed measures for the amendment of the law as to contempt, including the abortive Bill of 1894, are fully dealt with. The interest taken in the case of the *Duchess of Sutherland* (*Times*, March 19, 1893) is no doubt responsible for the instructive and entertaining chapter on the manner in which persons committed for contempt are dealt with in prison. The fuller detail in which the author has dealt with some of the heads of his subject, e. g. that of privilege from arrest, and the addition of many new cases which are brought down to date, has unavoidably increased the size of the work, in which moreover the excellent practice of giving references not only to the Law Reports but to all other Reports has been carried out.

A Handbook of the Law of Defamation and Verbal Injury. By F. T. COOPER. Edinburgh: W. Green & Sons. 1894. 8vo. lxxvi and 319 pp. (14*s.* net.)

SEVENTY years have elapsed since the publication of the only previous Scots book exclusively devoted to the law of defamation. The material differences between the Scots and English law on the subject have, at the same time, made a free use of the modern English treatises somewhat hazardous. In England, for instance, the presumption that words are defamatory arises much more easily in cases of libel than in cases of slander; in Scotland, language is either defamatory or not, and its being spoken or written makes no difference in determining whether it is defamatory. Again, in England, it is essential to the plaintiff's case that the defamatory words should be communicated to a third person. Scots law, on the other hand, grants *solatium* for injured feelings, and, consequently, publication to the person defamed alone is sufficient to ground an action. Practitioners, mindful of these and other distinctions between the two systems, are wary of relying too much on the guidance of English authorities, and, while wearily searching the digests, have very often longed for a modern Scots treatise on this department of jurisprudence.

In this work Mr. Cooper has provided a ready means of getting at the Scots decisions relating to any particular question that can arise in connexion with this branch of the law. To this end the book is ingeniously

arranged. There is an exhaustive dictionary, admirably put together, of words and imputations complained of as defamatory in reported cases, with the name of the case in which they occurred. The dictionary occupies forty pages; for a Scotsman's vocabulary of abuse is not straitened or colourless, it is vigorous and picturesque. The defender who employs epithets or expressions to which nothing analogous can be found in this dictionary must have a notable command of original language; and this is rare. The arrangement of the text, too, is simple and logical, though exception may well be taken to the plan of treating the plea of *veritas* as a branch of the doctrine of privilege. Justification and privilege are certainly quite distinct in England. The classification of defamatory imputations under appropriate heads cannot fail to greatly facilitate reference. The whole work, indeed, is, in many respects, rather a skilfully-arranged digest than a treatise. Not infrequently, the author, in place of grappling with a difficulty, takes refuge in a generalization, and in some places, where a careful balancing of arguments would have been appropriate, we find merely a confident assertion. It is perhaps unfair, however, to expect in a 'handbook' a full presentation of so complex a subject.

Throughout the book Mr. Cooper exhibits considerable independence of view, criticizing dicta and even decisions with an easy freedom. Occasionally his boldness strikes us as indiscreet, as when (p. 2) he characterizes a doctrine, 'often laid down in decisions,' as a 'worthless legal fiction, which has been, not very successfully, bolstered up . . .' Again, the rule that imputations holding a person up to public ridicule and contempt are actionable—supported though it be by a 'volume of decisions'—is, in Mr. Cooper's judgment, 'a rule which permits the law to be the handmaid of passion and sentiment, and to be a judge of aesthetics in criticism.' Clearly a 'handmaid of passion' will not make a good judge, even though she be merely judging 'aesthetics in criticism'—whatever that is. If, however, by aesthetics are meant the canons of good taste, Mr. Cooper is not guiltless of their breach; he is not an 'aesthete in criticism.'

We have also received:—

The Law of Negligence in New York. By JOHN B. LEAVITT. New York: Diossy Law Book Co. 1895. La. 8vo lv and 806 pp.—Mr. Leavitt's work is a digest of the most full and elaborate kind, furnished with every possible appliance in the way of indexing and cross reference. It will probably be indispensable to practitioners in the State of New York, of great use to American text-writers, and of appreciable use to practitioners in other States. As it deals exclusively with New York decisions, we cannot say that it is likely to be used here except for occasional verification of particular lines of authority on points where our own reported cases are meagre. Some of the learned author's incidental remarks on the manner in which cases are got up and argued lead us to think that the average of both general education and professional training in the Bar of the Empire State must leave a good deal to be desired. Other passages illustrate the mischief (by no means confined to the State of New York) wrought by the late Mr. D. D. Field's premature and over-ambitious attempt to codify the common law.

The French Civil Code, with the various amendments thereto as in force on March 15, 1895. By HENRY CACHARD. London: Stevens & Sons, Lim. 1895. 8vo. xii and 611 pp. (20*s.*)—This translation of the Civil Code is

admirably done and supplies a distinct want to the English lawyers. The expressions of French law in many of the articles are almost incapable of being succinctly translated into English, but Mr. Cachard has been very successful in giving their meaning, so far as it is possible to reproduce it in an English form and English legal phraseology. We wish the book the success which it certainly deserves.

A Dictionary of Crimes and Offences according to the Law of Scotland. By JOHN W. ANGUS. Revised by R. B. SHEARER. Edinburgh: W. Green & Sons. 1895. 8vo. 538 pp.—This book, we doubt not, will be serviceable to magistrates and others engaged in administering the Criminal Law in Scotland. The various crimes and offences of a criminal nature are grouped, dictionary-wise, under separate heads. To many of the definitions notes in smaller type are appended, containing illustrations and references to standard authorities. The statements of the law are concise and, so far as we can discover, accurate. A magistrate, who has this work near his desk, will be able, after a few rapid glances at its pages, to exhibit a really creditable acquaintance with Scots Criminal Law. If, however, he happen to be dealing with a contravention of the Factories and Workshops Acts, or of the Coal Mines Regulation Act, 1887, or of certain other statutory enactments, he will look for information in vain; and he may possibly be somewhat annoyed.

Marine Insurance. By WILLIAM GOW. London: Macmillan & Co. 1895. 12mo. xviii and 401 pp.—This is one of the series of 'Commercial Class-Books' now in course of publication by Messrs. Macmillan. The book is not written by a lawyer, and is presumably not intended for the use of lawyers. The Preface modestly claims that the work is 'adapted for the needs of beginners, and of those desirous of obtaining a general knowledge of the principles and practice of marine insurance, rather than a complete criticism of recent decisions on the subject.' Those 'recent decisions' seem to be brought up to date, but many of the forms of citation used are unusual, and in some instances references to the Times Law Reports only are given—e.g. *Reischer* v. *Borwick* (p. 142) is reported '94, 2 Q. B. 548, and *The Bedouin* (p. 205) will also be found in the Law Reports, '94, P. 1.

The Law Journal Quarterly Digest, Jan. 1 to March 30, 1895. London: Stevens & Sons, Lim. (*2s. 6d.*)—Lord Campbell wanted to have a decennial auto-da-fè of all reported cases. Failing this heroic remedy we have to fall back on digests, and it is evident that the digest is becoming more and more indispensable to the practitioner every day. The present digest is an instance of this necessity. It does what not the most industrious of practitioners can do for himself or only at an utterly disproportionate expense of time and trouble. Here we have a complete and compendious summary of current case law for the past quarter, enabling the practitioner to discover at a glance whether in all the multifarious literature of reported cases from the Times Law Reports or the Law Times note to the finished product of the reporter in the pages of the Law Reports, there is anything which concerns him. We said complete, and so the digest is with one qualification. Why no references to 'The Reports'? *Fas est et ab hoste doceri.*

Adoption and Amendment of Constitutions in Europe and America. By CHARLES BORGEAUD. Translated by C. D. HAZEN. With an Introduction by JOHN M. VINCENT. New York and London: Macmillan & Co. 1895. 8vo. xxi and 353 pp. (*8s. 6d.* net.)

The Conveyancing Acts, 1881, 1882 *and* 1892 . . . *and the Settled Land Acts*, 1882 *to* 1890, *with Notes*. By E. P. WOLSTENHOLME, W. BRINTON and B. L. CHERRY. Seventh Edition. London: William Clowes & Sons, Lim. 1895. 8vo. xxxii and 499 pp. (20*s*.)

The Law and Practice in Enfranchisements and Commutations . . . together with the Copyhold Act, 1894, *fully annotated*. By ARCHIBALD BROWN. Second Edition. London: Butterworths. 1895. 8vo. xxi and 503 pp. (16*s*.)

Le système judiciaire de la Grande Bretagne. Par le C^te^ DE FRANQUEVILLE. Two volumes. Paris: J. Rothschild [London: Stevens & Sons, Lim.] 1893. 8vo. Vol. I, viii and 614 pp. Vol. II, x and 740 pp. (24*s*. net.)

The Relationship of Landlord and Tenant. By EDGAR FOA. Second Edition. London: Stevens & Haynes: Waterlow & Sons, Lim. 1895. La. 8vo. cxv and 765 pp.

History of the Law of Real Property in New York. By R. L. FOWLER. New York: Baker, Voorhis & Co. 1895. 8vo. xxxvi and 229 pp. ($3 net.)

The Patents, Designs and Trade Marks Acts, 1883 *to* 1888. Consolidated with an Index, by LEWIS EDMUNDS. Second Edition. London: Stevens & Sons, Lim. 1895. La. 8vo. 86 pp. (2*s*. 6*d*.)

The Life of Sir James Fitzjames Stephen. By his brother, LESLIE STEPHEN. With two portraits. London: Smith, Elder & Co. 1895. 8vo. x and 504 pp. (16*s*.)

The Law of Property. By REGINALD A. NELSON. Madras: Srinivasa, Varadachari & Co.; London: Sweet & Maxwell, Lim. 1895. 8vo. xiii, 494 and xxxi pp.

A Digest of the Law relating to District Councils. By G. F. CHAMBERS. Ninth Edition. London: Stevens & Sons, Lim. 1895. La. 8vo. xxvi and 283 pp. (10*s*.)

The Principles of Bankruptcy. By RICHARD RINGWOOD. Sixth Edition. London: Stevens & Haynes. 1895. 8vo. xxxii and 381 pp.

The Revised Reports. Edited by Sir FREDERICK POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XIX. 1817–1818 (6 Dow; 2 & 3 Swanst; 1 B. & Ald.; 8 Taunt.; 1 & 2 Moore; 5 Price; 2 Stark). London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1895. La. 8vo. xvii and 758 pp. (25*s*.)

A Digest of the Law of Easements. By L. C. INNES. Fifth Edition. London: Stevens & Sons, Lim. 1895. 8vo. xxviii and 127 pp. (7*s*. 6*d*.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
